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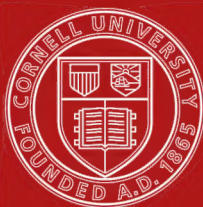
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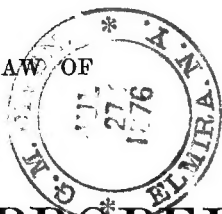
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A TREATISE

ON THE LAW OF



PERSONAL PROPERTY.

VOL. II.

EMBRACING ORIGINAL ACQUISITION, GIFT, SALE,
AND BAILMENT.

BY JAMES SCHOULER,

AUTHOR OF "A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS."

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P R E F A C E.

WHEN my former volume on Personal Property was issued, three years ago, it was announced, that, in order to complete the work according to the original plan, another volume on Title would be required. I then felt diffident about trespassing upon my professional brethren with another book; but as to the propriety of giving unity and scope to the present work I never doubted, and the warmth of welcome with which the first volume was received soon convinced the publishers and myself that the second and final one must follow.

Pursuing, as before, a natural order of progression, I am enabled in this volume to give to the leading topics the full space needful for an elementary text-book. Our law of Original Acquisition (which embraces topics familiarly known by the names of Occupancy and the Confusion of Goods) and of Gifts receives in these pages a more ample treatment than any former writer has bestowed. With the law of Sales it is different; for here I have been much aided by the larger works of Story and Benjamin,—the latter especially,—besides Judge Blackburn's essay, as my foot-notes constantly attest. But, pursuing independent methods, making ample use of materials collected from all other accessible sources, and constantly investigating the reported cases for myself, I have carefully prepared an exposition of the law of Sales of Personal Property which I may fairly call my own; the leading object being, if it were possible, to furnish, within the space

of some four hundred and eighty pages, a better working treatise on the subject for English and American lawyers than has hitherto been presented. The minor topics of Assignment, Limitations, and Bailment, incidentally touched upon in my former volume, have received here such final treatment as appeared suitable.

Whether this work on Personal Property, which has cost me six years of persevering labor, be, on the whole, well or ill done, I leave to the judgment of my readers; and for myself will only add, that I value the office of a text-writer too highly to pen a single paragraph for the accuracy of whose statements I cannot at least pledge a personal investigation of the authorities, on my part, in the effort to extract a true guiding principle.

JAMES SCHOULER.

Boston, May 8, 1876.

CONTENTS.

PART IV.

TITLE TO PERSONAL PROPERTY BY ORIGINAL ACQUISITION.

CHAPTER I.

TITLE IN GENERAL; OCCUPANCY.

INTRODUCTORY	1
Summary of doctrines in the preceding volume	1
Title in general; its essentials	2
How title to personal property may accrue; original and derivative acquisition	4
Title by original acquisition	5
Occupancy in the primitive sense; foundation of title	8
Occupancy in the modern sense	8
Chattels abandoned or derelict	8
Waifs; to whom they belong	9
Treasure-trove and its ownership	9
Wrecks; ancient and modern doctrines as to title	10
Lost chattels, and to whom they belong	14
Rule as to lost negotiable instruments	17
Estrays and wild animals; their ownership	18
Stolen chattels, original owner's title	20
<i>Bona fide</i> buyer's title to lost or stolen chattels	21
Where chattel was sold in market-overt	21
Where chattel is of a negotiable character	23
When a finder may be treated as a thief	24
Miscellaneous instances of chattels without a known owner	25
Summary of the modern doctrine of occupancy	26

CHAPTER II.

TITLE TO PRODUCTS; ACCESSION AND CONFUSION.

Title to general products, accession and confusion, to be considered	29
Title to general products	29
Products of the brain; patents and copyrights	29
Increase of animals; income of capital	30

Accession considered as a rule of title	31
Definition of chattel accession; its elements	31
Old distinction as to creating some new species or not	34
Qualification of rule by considering comparative values	35
Bearing of the taker's intention in such cases	35
Doctrine summed up as to chattel accession without mutual assent	37
Accession of chattels by agreement of parties	37
Accession of one person's chattels to another's real estate, intentional or unintentional	39
Confusion considered as a rule of title	40
Confusion defined, and distinguished from accession	41
Confusion by mutual consent; its effect	42
Confusion by one's wilful misconduct; its effect	45
Confusion by one's unintentional mistake of fact	47
Confusion because of inevitable accident or <i>vis major</i>	50
Roman law of confusion	52
Points of similarity and of difference between accession and confusion	53

PART V.

TITLE TO PERSONAL PROPERTY BY GIFT.

CHAPTER I.

GIFTS IN GENERAL.

Definition of gift; origin of such transfers	55
The absence of consideration as an element	57
Gifts are a species of contract or mutual undertaking	59
Capacity of parties and good faith in the transfer essential	62
Rule as to mental capacity of donor and donee stated	62
Rule as to freedom of will and good faith on both sides	64
Gifts should be certain and to a certain party	66
Classification of gifts; gifts <i>inter vivos</i> ; and gifts <i>causa mortis</i>	66

CHAPTER II.

GIFTS INTER VIVOS; HOW EXECUTED.

Gifts <i>inter vivos</i> defined; their essentials	68
Whether a promise to give is enforceable	68
Such promises should be distinguished from contracts upon consider- ation	70
Delivery with suitable intention, the requisite act on the donor's part	70
Delivery according to the subject-matter; actual or constructive de- livery	70
Words of gift alone do not suffice	7

Corporeal chattels pass by manual delivery	71
Rule where the donee is the custodian	71
Whether delivery of receptacle carries its contents	72
Rule of delivery as to incorporeal chattels	72
Where delivery is fully such as the species admits of	73
Imperfect delivery supported as an equitable assignment	75
Bonds, negotiable instruments, shares of stock, &c.	73, 76
Savings-bank books	76
Imperfect delivery supported as declaration of trust	78
Doctrines of equitable assignment and declaration of trust compared	80
Delivery to donee through some third party	80
Where such third party takes as trustee for donee	81
Where custodian of the chattel is to deliver to donee	81
Revocation of custodian's authority; death of donor pending delivery	82
Delivery by instrument in writing	83
Deed of gift, and its effect	83
Other instruments in writing, and their effect	84
Acceptance the requisite act on the donee's part	85
Acceptance of a beneficial gift, how far presumable	85
Act of donee should correspond to donor's act	86
Other acts of donee; proceedings to perfect title, choice, &c.	87
Proof needed to establish an executed gift	87
Actual intention to be gathered from words, acts, and mutual conduct of parties	88
Circumstances favorable to sustaining a transfer as a gift	88
Circumstances unfavorable to sustaining a transfer as a gift	89
Where a deed of gift is made	90
Evidence of gift by forgiveness of a debt	90
One's mental reservation cannot defeat his gift	92
Summary of the law of execution of gifts <i>inter vivos</i>	92

CHAPTER III.

GIFTS INTER VIVOS; EFFECT OF EXECUTION; QUALIFIED GIFTS.

Effect of executing a gift <i>inter vivos</i> to be viewed in two aspects	94
Its effect as concerns the parties themselves	94
Cannot be revoked or annulled by either party	94
How far upheld upon the donor's death	96
Avoidance for mental incapacity or fraud	97
Parties may rescind or modify by mutual consent	97
Where parties make new contract as to the gift	97
Whether parental gifts may be revoked	98
Civil law of revocation	99
Its effect as concerns third persons	99
In general, conclusive against them	99
Exceptions as to <i>bona fide</i> purchasers, &c.	100
The main exception concerns prejudiced creditors of the donor	101
Fraudulent transfers, how far affected by stat. 13 Eliz. c. 5, and analogous legislation	102
Fraud a question of fact; intent to hinder, delay, and defraud	106

Rule as to the donor's antecedent creditors	107
Rule as to the donor's subsequent creditors	109
Rule where a donor has died insolvent	112
Concluding remarks as to the doctrine of fraudulent transfer	113
Summary of law as to the effect of executed gifts	114
Qualified or conditional gifts	114
Successive expectant interests by gift	115
Gifts in alternative ; reservation to donor ; discretion left to donee	116
Gifts for donor's own use cannot exclude his creditors	120
How qualified gifts are to be construed	121

CHAPTER IV.

GIFTS CAUSA MORTIS ; PRELIMINARIES.

Nature of gifts <i>causa mortis</i> ; their definition	122
History of such gifts ; how distinguished from ordinary gifts and legacies	123
General division of subject for this and following chapters	129
As to the capacity of parties to the gift	129
Considerations, as to testamentary or contract capacity	129
Undue influence ; marital and parental relations	130
As to the property which may be given <i>causa mortis</i>	132
Whether such gift may embrace one's whole property ; civil and common law	132
Such gifts confined to personal property	136
Incorporeal species may now be thus given	136
Exception as to gifts of the donor's own note, bill, &c.	138
Unless bill, draft, &c., is accepted by drawee	142
As to expectation of death	143
Civil and common-law doctrines discussed	143
"Last illness," "peril of death," "expectation of death"	144
General conclusion from the modern authorities	150

CHAPTER V.

GIFTS CAUSA MORTIS ; HOW EXECUTED.

As to the methods of execution by donor and by donee	152
Execution on donor's part requires uninterrupted delivery	152
Mere promise to give is ineffectual	153, 156
Delivery by donor, as to corporeal chattels	153
Symbolical delivery ; delivery of receptacle and its contents	154
Intention to give and the act of delivery must co-exist	156
Delivery by donor, as to incorporeal chattels	156
The rule radically changed in modern times	156
Gift of bonds and mortgages, &c.	157
Gift of bills, notes, and other negotiable instruments	158
Gift of insurance policy	159
Gift of stock	160

Gift of savings-bank deposit	161
Gift of due-bill, receipt, &c. ; of receptacle and contents	163
Gift to third person for donee	165
Where a residuary legatee promises delivery	167
Delivery by instrument in writing	168
Whether formal delivery can be dispensed with	170
Case where donee is already in possession	170
How far chancery aids informal delivery	172
Execution on donee's part ; what acts are requisite	172
Proof of execution needful to establish such gifts	173
Burden on donee ; donor's declarations, &c.	174
How the issue is determined in practice	175
Evidence of such gift by forgiveness of debt	175

CHAPTER VI.

GIFTS CAUSA MORTIS ; EFFECT OF EXECUTION ; QUALIFIED GIFTS.

Effect of executing a gift <i>causa mortis</i> to be viewed in two aspects	176
Effect of execution as concerns the parties themselves	176
Gift revoked by donor's recovery from peril	176
Gift revoked by donee's death before the donor	177
Gift revoked by donor who repents the gift	177
Whether such gift is revoked by posthumous birth	178
Revocation for mental incapacity or fraud	179
Controversies between donee and the donor's personal representatives, .	179
Effect of execution, as to third parties	180
Gift not allowed to defeat claims of creditors ; rule of practice	180
Qualified or conditional gifts <i>causa mortis</i>	181
General policy of gifts <i>causa mortis</i>	182

PART VI.

TITLE TO PERSONAL PROPERTY BY SALE.

CHAPTER I.

LEADING ESSENTIALS OF A SALE.

General observations as to the law of sales	185
Definition of sale	186
Barter or exchange	187
Sales classified ; absolute or qualified, executed or executory, of things specific or not specific, legal or illegal, private or public	188
Involuntary or judicial sales	189

The parties to a sale, — seller, buyer, agents, &c.	190
Sale of corporeal or incorporeal chattels	190
Three leading essentials to every sale	190
A thing to be sold	191
As to a thing which has ceased to exist	191
As to a thing which has not come into existence	192
A price to be paid	188, 195
As to payment in commodities, instead of money	195
Price should be fixed or ascertainable	197
Price sometimes left to a third party's adjustment	199
Price may be implied instead of expressed	200
Price should be <i>bona fide</i> ; need not be adequate	201
Mutual assent to transfer of the thing at the price	202
Mutuality as to the thing	202
Mutuality as to the price	204
Mutual assent in general; how expressed	204
Negotiation of a bargain; proposals, &c.	205
Bargain, how concluded by letters or telegrams	205, 207
Common and civil law doctrines compared	211
Limitations as to place and time of accepting proposal	213
Cases where proposer leaves time open for assent.	213
Assent to a proposal; how inferred from circumstances	217
Sale may be conditional or qualified	218
Construction of writings constituting a bargain	218

CHAPTER II.

TRANSFER OF PROPERTY RIGHT IN SPECIFIC CHATTELS.

As to transfer of property right in a sale	220
Mutual intention the guiding principle	221
Executory and executed sale contracts; civil and common law distinctions	222
Property transfer in sale of specific chattels; what are specific chattels	224
Rule where nothing remains to be done to the specific chattel	227
Transfer of property presumed when bargain is closed	227
Shifting of this presumption; rule qualified	228
Rule where something remains to be done to the specific chattel	231
The doctrines as announced by Judge Blackburn, putting into deliverable condition, weighing, measuring, &c.	231
Cases reviewed where the seller is to do the act	232
Cases reviewed where the buyer is to do the act	239
Delivery as a circumstance evincing such transfer	240
Summary: the doctrines of Judge Blackburn restated	242
Property right one element of title	243 n.

CHAPTER III.

TRANSFER OF PROPERTY RIGHT IN CHATTELS NOT SPECIFIC.

No transfer, in general, until the subject-matter becomes specific	244
Instances where goods must be separated, selected, &c.	244

But numerous exceptions are found ; mutual intent regarded	245
Instances where an article is made to order	247
Doctrine of subsequent appropriation under the contract	248
Cases reviewed as to general appropriation by seller, &c.	250
Something more than appropriation may be needful	254
Delivery as a circumstance in appropriation	256
Summary of the doctrine of general appropriation	258
Appropriation where chattels are made to order	258, 264
Rule as to unfinished chattels, ship-building, &c.	261
There may be property transfer for limited purposes ; rule as to creditors . .	265

CHAPTER IV.

SELLER'S RESERVATION OF THE *JUS DISPONENDI*.

How the seller may reserve the transfer of property by his acts	267
Rule of <i>jus disponendi</i> applies particularly to delivery by carrier	268
Seller's reservation ; bill of lading, &c.	268
Where bill of lading is accompanied by bill of exchange	270
Limitations of the <i>jus disponendi</i> doctrine	271

CHAPTER V.

CONDITIONS.

Conditions precedent to transfer	273
Conditions under general law of contracts	273
Rule of mutual intent ; stipulations dependent and independent	274
Precedence of conditions ; parties must strictly perform in turn . . .	276
Exceptions, where performance is waived, rendered impossible, &c. . . .	277
Conditions as a doctrine in the law of sales	281
Parties must perform in turn ; conditions precedent and concurrent . .	281
Sale where a third party must first perform	281
Exceptions as to waiver and impossibility considered	282
Stipulations as to time of performance ; how far conditional	287
Sales upon notice ; rule of giving notice	288
Where property transfer is conditioned on paying or securing price	290, 292
Obligation to deliver and obligation to pay are usually conditions precedent or concurrent	291
Condition of no title in buyer until cash is paid, notwithstanding delivery	292
Condition of no title in buyer until price is adjusted, notwithstanding delivery	294
Doctrine applies as against buyer's creditors	296
Rule as concerns sub-purchasers from the buyer	297
Exceptions growing out of waiver or impossibility	301
Rules of evidence in sales for cash, &c., on delivery	305
Where partial delivery or partial payment is provided for	306
Property may pass defeasible by condition subsequent	308

Sales "on trial," "on approval ;" bargain of "sale or return"	308
Conditional character of such sales	309
Sales with option given to buyer	315
Sales of goods "to arrive," &c.	315
Miscellaneous conditions ; rule of construction	318
"Condition precedent" distinguished from "warranty"	319
Sale by sample ; its implied condition	319, 321
Sale by description ; its implied condition	319
Sale of incorporeal securities ; condition of genuineness	322
Sale of specific corporeal chattel ; how far conditional	324

CHAPTER VI.

WARRANTY.

Warranty in general	326
Definition ; "warranty" and "representation"	327
<i>Caveat emptor</i> the rule ; exceptions numerous	328
Warranty in executory contract	329
How far an agent may warrant	329
How far custom or usage controls the law of warranty	332
Waiver of warranty, when inferred	333
Express warranty and implied warranty to be considered	333
As to express warranty	334
What representations have force of warranty	334
No special form of words necessary	337
Time of giving warranty ; prospective operation, &c.	338
As to buyer's opportunity for ascertaining the defect	339
Where express warranty is given in writing	340
Effect of parol evidence in such case	341
General interpretation ; cases of doubtful intent	343
Guaranty construed as warranty, and not as condition	346
Express warranty in horse-sales, &c.	346
Warranty of an animal's "soundness"	346
Expressions such as "sound and kind," "sound and perfect"	348
As to animal's defects, when discoverable, &c.	350
As to implied warranty ; of quality or title	352
Implied warranty of quality	353
<i>Caveat emptor</i> rule ; its exceptions ; sources of confusion	353
Ascertained chattels to be here distinguished from unascertained chattels	355
General rule as to specific ascertained chattels	355
As to sale of meat or provisions	357
Rule as to unascertained chattels ; sale by description	359
How far description amounts to condition precedent	362
Implied warranty of merchantable quality or fitness in such sales	364
Limitations of such warranty	366, 368
As to sales by sample	369
Implied warranty that bulk shall correspond with sample	371
"Average sample" sales	372
Rule of inspection in sample sales	372

Bearing of fraud and artifice upon such sales	376
Latent defects in an article made or supplied to order	378
Rule as to second-hand chattels	380
Rule of implied warranty where express warranty is given	380
Implied warranty of title	381
Doctrine in doubt in executed, not executory, contracts	381
Rule clear as to fraud, express warranty, &c.	382
Where sale is by executor, sheriff, pledgee, bailee, &c.	382
Where sale is of an incorporeal chattel	383
A quitclaim of one's title always implied	384
Question whether, in other cases, there is such warranty	385
English doctrine in this respect; authorities reviewed	385
Buyer now permitted to recover price paid, but <i>qu.</i> as to damages	388
American doctrine in this respect	390
Whether one sells while in or out of possession	390
Where one, after selling, acquires a new title	392
Doctrine of the civil law; eviction, &c.	392
Summary as to implied warranty and <i>caveat emptor</i>	393

CHAPTER VII.

DELIVERY.

Delivery in general; numerous meanings of the word	396
Seller's general duty of delivery in fulfilling bargain	398
As to place and time of delivery	399
General rule as to place; mutual intent qualifies	400
Time of delivery; sundry expressions; month, day, hour, &c.	401
As to the quantity to be delivered	404
The contract determines; neither more nor less	404
Principles of construction; substantial not literal compliance.	407
Rule of partial delivery	408
As to the manner of delivery; general principles	408
<i>Indicia</i> of title; constructive delivery	409
Miscellaneous points as to delivery	411
Seller's limit of responsibility as to transit, &c.	411
Principle as to warehousemen and other agents	411, 413
Incidents of delivery follow principal thing	414
Where thing sold is in buyer's possession; bill of sale, &c.	414
Seller's responsibility as to a chattel sold, but not delivered.	415
Seller's duty, in general, commensurate with scope of the contract	415

CHAPTER VIII.

BUYER'S DUTIES; ACCEPTANCE AND PAYMENT.

Acceptance and payment the buyer's leading obligations	417
As to acceptance	417
General principles; acceptance more than receipt	417
Buyer's right to inspect, &c., before accepting	419
Acceptance, how inferred from delay, act of ownership, &c.	420

Duty of rejecting and returning goods, if unsatisfactory	422
Seller's waiver of strict legal requirements in such cases	424
Case of delivery for acceptance by instalments	424
As to payment; several sorts of payment	424
Payment of price in cash; ordinary rule	425
Time and manner of performance; payment by instalments	425
Rules as to cash payment applied	427
Tender of cash; what suffices; doctrine set forth	428
Payment of price by present adjustment not in cash	432
Buyer's note, acceptance, &c., whether absolute or conditional payment, Where such note, &c., is secured, or a third party's obligation or some commodity is given	432 434
Effect of such third party's insolvency before seller makes delivery	435
Where adjustment is partly cash and partly credit, &c.	436
As to sales on credit; general principles	436
As to payment through agents of buyer or seller	437
Payment to seller's own agent	438
Lien of certain agents not discharged by payment to principal	438
Agent more frequently empowered to receive cash than make other terms	440
As to settling with broker, &c., who sells for principals	440
Roman law of payment and tender	441
Miscellaneous costs and expenses, &c., attending ordinary sales	441

CHAPTER IX.

STATUTE OF FRAUDS; CONTRACTS OF SALE EMBRACED.

The common law of sales, modified by important legislation	443
Statute of Frauds; its history; language of seventeenth section	443
Policy is to partially restrict transfers; writing only <i>sub modo</i> essential,	445
Legal consequences of a non-compliance	445
Conflicting theories in this respect stated	445
True view is, that the contract exists, but continues unenforceable	448
How such contract becomes good by subsequent acts	448
Where statute compliance comes after goods have ceased to exist	449
Conflict of laws applied; note given in consideration of damages, &c.	450
Section 17 of the statute; its leading divisions	451
What contracts are thus embraced	451
"Contracts for the sale of;" whether executory contracts, &c., are included	452
English and American decisions stated; Lord Tenterden's Act, 452, 455, 458	458
Summary of conflicting doctrines as to the contracts embraced	461
Auction sales included; as to mortgage; loans, and miscellaneous con- tracts	463
Entirety of a contract; as to sale of lots or parcels	464
"Goods, wares, and merchandises;" what property is included	467
Personal property only; 4th section of statute distinguished	467
Cases reviewed as to unsevered crops	467
<i>Fructus industriales</i> or annual crops are not "interests in land"	470
Cases reviewed as to <i>fructus naturales</i>	471

General summary as to unsevered products under the statute	474, 475
Contracts for the sale of fixtures	476
Whether section 17 applies to incorporeal chattels	476
Conflicting doctrines in this respect; statutory changes	477
The standard of "price" or "value;" legislative provisions	479
How to determine whether a price reaches the standard	480
The rule of entirety in contracts here applied	481
Excessive price vitiates other stipulations in entire contract	483

CHAPTER X.

STATUTE OF FRAUDS; ORAL COMPLIANCE.

Two methods of oral compliance under section 17	484
The buyer's acceptance and actual receipt of part	484
Legislative language; its force as to seller; delivery.	484, 485
Buyer's acceptance and actual receipt distinguished	486
General rules as to buyer; entirety; time of performance; tests	487
Acceptance and receipt by one of joint purchasers	489
Whether accompanied of necessity by transfer of property right	489
Application to sales on condition; cash on delivery transfers, &c.	491, 492
Effect of part acceptance and receipt, &c.	493
Part acceptance; general doctrine	494
Proof of intention; right to inspect, &c.	494
Carrier or other agent to receive may not be agent to accept.	496
Acceptance, how evinced; mainly a question of fact	497, 500
Actual part receipt considered; general doctrine	500
Part receipt where goods are already in buyer's custody	501
Part receipt where goods are in a third person's custody	502
Part receipt where goods are in the seller's custody	504
Constructive delivery and receipt; transit, &c.	506
The buyer's giving of earnest or part payment	507
Earnest and part payment distinguished; general doctrine	508
Where both discharge of debt and payment of price are contemplated,	510
This mode of compliance does not necessarily pass property right	510

CHAPTER XI.

STATUTE OF FRAUDS; WRITTEN COMPLIANCE.

Written compliance is by signed note or memorandum	512
Subscription need not be by enforcing party; written contracts distinguished.	512
Common rules of evidence apply; subject, how classified	513
As to the written note or memorandum	514
Letter, acknowledgment of invoice, telegram; two or more writings	514
Written proposal and parol acceptance; question of intention	516
To whom is the memorandum addressed; writings not contemporaneous, &c.	517
Oral evidence; how far admissible.	518
As to what such writing should contain.	519
The identity of parties to appear as buyer and seller.	519

The subject-matter and essential terms should be shown	521
"Price" distinct from "consideration;" and other essentials	522
Substance, and not form, regarded; competency of evidence	523
Whether a writing which repudiates can suffice as a memorandum	524
Where the original bargain has been modified	527
As to how and by whom the writing should be signed	529
Method of signing; writing, printing, stamping, &c.	529
Signature on one of several papers; by the party to be charged	531
As to compliance by means of agents	532
Authority, how conferred; whether seller's agent may bind buyer	533
Evidence requisite; telegraph clerks, &c.	535, 536
Agent cannot be the other party himself	536
Auctioneer's authority to make a memorandum binding upon both parties	537
Broker's authority to make memorandum	539, 542
"Bought and sold notes," and their efficacy	540 and n.
Sales sometimes affected by 4th section of Statute of Frauds	542

CHAPTER XII.

SELLER'S REMEDIES BY PERSONAL ACTION.

Seller's remedies in general for buyer's breach	544
Remedy by personal action where the property has not passed	544
Action for damages; rule of measurement	545
Items thus reckoned; duty of re-sale	545, 546
As to estimating an agent's torts, &c.	549
Market value; exceptions to rule of measurement	549
Choice of remedies given in New York practice	551
Rule under a part delivery; as to liquidated damages	552
Remedy by personal action where the property has passed	553
Seller sues as a creditor, if possession be surrendered	553
But rights under security remain; conditional surrender	554
Form of action by seller for goods sold and delivered	554
Action where property has passed, but not possession	555
Seller's lien advantages in this case to be presently considered	555

CHAPTER XIII.

SELLER'S GENERAL REMEDIES AGAINST THE GOODS.

Re-sale, lien, and stoppage <i>in transitu</i> , the subjects to be considered	556
As to unpaid seller's rights in goods which he holds after the property is passed	557
Nature of the lien-right here conceded by common law	557
Lien-right as between unpaid seller and insolvent buyer himself	559, 562
Custody of seller or his agent; advances to buyer	560, 561
Lien-right as between unpaid seller and buyer's sub-vendee	563
Seller may, by his conduct, be estopped from asserting lien	564
Otherwise, lien is good as against the sub-vendee	565
Doctrine of seller's estoppel in such cases	566

How bailee in possession may be estopped	571
Law of re-sale ; general doctrine	571
Re-sale where property has passed, but not possession	572
Such re-sale a technical breach of contract, but available in English practice	574
Summary of English law of re-sale	576 n.
American doctrine of re-sale	577
Requirement of notice ; replevin suits	578

CHAPTER XIV.

SELLER'S LIEN, AND RIGHT OF STOPPAGE IN TRANSITU.

Lien, and stoppage <i>in transitu</i> ; their nature	579
The seller's lien ; its nature and extent	579
How the lien may have been excluded or waived	580
Up to what period the lien extends	581
Effect of transferring documents of title	582
Documents of title in sales considered	583 n.
How buyer, by tender, &c., may put an end to seller's lien	584
Right of stoppage <i>in transitu</i> , in general	586
Parties by and against whom the right is exercised	587
Seller, consignor, &c., but not a stranger, may exercise the right	587
Party against whom stoppage is made is buyer or <i>quasi</i> buyer	588, 589
The transit with its proper limits	590
Carrier for the transit ; continuous purpose of transportation	591
Buyer may break transit, and intercept his goods	592
Carrier's acts at terminus ; what acts exclude seller	592
Method of exercising right of stoppage	594
Middleman usually notified, &c.	594
Effect of exercising right of stoppage	596
Parties stand as before ; no rescission	596
Seller's right paramount to that of buyer's attaching creditors	597
Right, how defeated by transfer of documents of title	597
Must be a <i>bona fide</i> transfer to third party for value	598

CHAPTER XV.

BUYER'S REMEDIES.

Instances in which the buyer may invoke his remedies	600
Where the seller fails altogether to deliver	600
Personal action ; rule of damages ; instalment contracts	600, 603
When demand is necessary	604
Specific performance ; the choice of remedies	605
Rule as to suing in trover	605
Where there is delivery, but not of suitable kind or quality	606
Confusion of rules ; buyer's right of rejection	606
Limit of the right to reject ; its legal effect	609
Buyer may keep the goods, and claim damages for inferiority	610
Requirement of notice ; matters of practice	611

Measure of damages for breach as to quality	615
Under instalment contract; waiver of breach	617
Rule for breach of warranty of title	618
Where delivery is unreasonably late	618
Buyer's option of remedies in such a case	618

CHAPTER XVI.

SALES INVOLVING ERROR AND FRAUD.

Special causes of avoidance; error, fraud, illegality, and mutual rescission,	620
Avoidance by reason of error or mistake	620
Mistake should be substantial, &c.; instances cited	620, 623
Mistake as to quality, &c., not substantial	622
Mistake as to the party dealt with	622
Rule of construction; mutual and one-sided mistakes	624
Effect of mistake upon a sale; whether contract is executed	626
Restitution in general required; entire contracts, &c.	627
Duty of one who receives goods by mistake	628
Avoidance by reason of fraud; fraud in general	628
Fraud of the seller on the buyer	629
<i>Caveat emptor</i> does not countenance fraud	629, 638
Buyer must have been deceived; his duties	632
He may sue upon the fraud or for breach of warranty	633
<i>Scienter</i> to be here shown; rule of damages	634
Rule where fraud is by seller's agent	635
Fraud of the buyer on the seller	636
Buyer's fraud, how inferred; rule as to sub-buyers, &c.	637
Where buyer is an impostor	638
Where buyer conceals important information	639
Where one induces sale to another; Lord Tenterden's Act	640
Seller's election of remedies; matter of practice	641
Extortion of a bill of sale	642
Fraud in a case of exchange	642
Fraud of both buyer and seller upon some third party	642
General doctrine; bearing of legislation	642

CHAPTER XVII.

ILLEGAL SALES; MUTUAL RESCISSION.

Avoidance by reason of illegality	643
General rule with various qualifications	643
Where some promises are illegal and others legal	645
Courts incline to press closely in cases of palpable moral offence	646
Principal cannot profit by his agent's illegal contract	647
As to sales illegal at common law	647
Sales against public policy; sale of offices	648, 649
Sale of law-suits; restraint of trade, &c.	650
As to sales made illegal by legislation	651
Sales contravening revenue acts, liquor acts, Sunday laws, &c.	651, 652
Avoidance by mutual rescission	653

CHAPTER XVIII.

SALES AT AUCTION.

Public or auction sales in general	655
Auctioneers, their rights and duties	656
How far an auctioneer is an agent	656
His personal responsibilities; compensation, &c.	658
Preliminaries of the auction sale	660
Terms and conditions; advertisement, &c.	660
Method of conducting the sale at auction	663
Taking bids, closing upon highest bid	663
Memorandum and part payment under Statute of Frauds	663
Auctioneer's warranty; license to enter premises	664
Fraud in the biddings; general principles	665
On the part of bidders; combinations to stifle competition, &c.	665
On the part of seller or auctioneer; puffing and by-bidding	666, 668
Limiting bids; sales with or without reserve	668
Enforcement of the auction contract	669
Settlement with purchaser; deposit-money, &c.	669, 670
Risks of title after the sale	670
Remedies to enforce or for default	670
Buyer's duty; auctioneer's adjustment with seller	671

PART VII.

TITLE TO PERSONAL PROPERTY; MISCELLANEOUS.

CHAPTER I.

INDORSEMENT AND ASSIGNMENT.

Indorsement, assignment, and limitations, especially affect incorporeal chattels	672
Indorsement; its leading principles	672
Assignment; its leading principles	673
What may be assigned; legal and equitable rules	673
Formalities of assign ment considered	676
Notice to the debtor; rights of subsequent parties as to notice	678, 680
Construction of assignments	680
What an assignment carries; consideration inquired into	680
Assignee's position under an assignment	682
His rights with reference to his assignor	682
His rights with reference to the debtor	683
Whether assignee has final recourse against the assignor	685

CHAPTER II.

LIMITATIONS.

Prescription in general; our statutes of limitations	686
Purpose of such legislation, to afford repose	687
Period of limitation as to personal property suits	688
Rule stated as to various classes	688, 689
Disabilities which prevent the statute from operating	689
Plaintiff's minority, coverture, insanity; absence "beyond the seas," or imprisonment	689
Defendant's absence, &c.; how disability operates	690
Government an exception to the rule, but not municipal corporations	690
How the period of limitations may be broken	691
By debtor's part payment	691, 692
By debtor's new promise or acknowledgment	691
Effect of limitations	692
When a new act is passed; what statute affects the case	692
The remedy and the right; pleading; rule as to new promise	693

PART VIII.

BAILMENT OF PERSONAL PROPERTY.

CHAPTER I.

BAILMENT IN GENERAL.

Bailment distinguished from full title; general definitions	695
Recompense or no recompense the usual test; degrees of care, &c.	696
Rule of care, diligence, skill, &c.	697
Where bailment is for bailor's sole benefit	697
Where bailment is for mutual benefit of bailor and bailee	699
Where bailment is for bailee's exclusive benefit	701
Further rights and duties growing out of the relation	701
As between bailor and bailee	701
As concerns third parties	702
How a bailment is terminated	702
Demand by bailor; effect of bailee's conversion, &c.	703

CHAPTER II.

BORROWED AND HIRED CHATTELS.

As to the bailment of borrowing and hiring in general	704
The Roman mutual bailment not recognized at our law	704
English and American doctrine as to restoration in kind	704

Rule as to the borrower or hirer of money; loans upon security . .	705
Classification of the present subject	705
The measure of care required as to a borrowed or hired chattel	706
Rule where the chattel is borrowed	706
Rule where the chattel is hired	707
Responsibility of lender or hirer for a third party's acts	707
General rights and liabilities of parties to such bailment	708
As between lender or letter, and borrower or hirer	708
As regards strangers	710
The payment of hire-money or recompense	711
Termination of such bailment	711
Distinction between borrowed and hired chattels in this respect . .	711
Demand by bailor; restitution; mutual adjustment between parties .	712

TABLE OF CASES CITED.

A.		PAGE		PAGE
Abbott v. Shepard		209	Allen v. Pink	348
v. Tenney	105,	113	v. Polereczky	68, 82, 150
Able v. Shields		677	Allerton v. Allerton	633
Acebal v. Levy	201, 522,	524	v. Lang	72, 76, 97
Acraman v. Morrice		234	Alley v. Adams	41
Adair v. Winchester		684	Allman v. Davis	234
Adams v. Adams		19	Alna v. Plummer	538
v. Couillard		647	Althouse v. Alvord	547
v. Dale		404	Ames v. Miss. Boom Co.	41
v. Guerard		687	Amis v. Witt	140, 159
v. Lindsell	209, 210,	216	Ammon's Appeal	112
v. O'Conner		296	Amory v. Flyn	19
v. Richards		611	Anderson v. Green	100
v. Robinson		677	v. Scott	500
Adams Mining Co. v. Senter	235,	238	v. Van Alen	680, 681
Adamson v. Jarvis		658	Andrew v. Dieterich	199
Agra, &c. Bank v. Leighton		614	Andrews v. Durant	262
Aguirre v. Parmelee		587	v. Kneeland	330
Aiken v. Blaisdell	651,	652	v. Rue	684
v. Bruen		100	Antrobus v. Smith	69
v. Hyde		310	Applegate v. Hogan	578
Aldrich v. Jackson		323, 324	Appleman v. Fisher	649
Aldridge v. Johnson	249, 251, 252,	253, 256, 268	Archer v. Bayles	525
Alexander v. Brown		430	Archibald v. Argall	433
v. Comber		452	Armitage v. Insole	399
v. Gardner	256, 257,	411	Armstrong v. Toler	644
v. Gibson		330	Arnold v. Delano	226, 235, 559, 562, 563, 580, 581
v. Whipple		693	v. Prout	256, 413
v. Worman		624	Artcher v. Zeh	477, 510
Alger v. Scott		675	Ash v. Abdy	444
Allan v. Lake		361	v. Putnam	588
Allen v. Aguirre		509	Ashbrook v. Ryon	76, 158, 163
v. Allen		30	Ashburn v. Poulter	430
v. Bennett	519, 530,	532	Ashcroft v. Morrin	522
v. Cowan		71	Ashton v. Dawson	158
v. Delano		295	Astey v. Emery	413, 507
v. Gardiner		653	Atkins v. Boylston, &c. Ins. Co.	403
v. Hammond		621	v. Hosley	392
v. Jarvis	459, 545,	550	Atkinson v. Bell	248, 251, 458
v. Miller		684	v. Handon	436
v. Pancoast	674,	678	v. Mailing	409
			v. Runnels	683

Atkinson v. Smith	291, 292, 296	Barnard v. Campbell	247, 304, 568, 571, 688
Attorney-General v. Taylor	655	v. Kellogg	332, 372, 373, 374, 377
Attwood v. Emory	402	Barnett v. Terry	610
Atwater v. Clancy	342	Barr v. Gibson	202, 357, 359, 363
Atwood v. Cobb	402	v. Logan	578
v. Lucas	488	Barrett v. Deere	438
Aultman v. Theirer	311, 611	v. Goddard	234, 235, 506
Austen v. Craven	244, 245	Barron v. Davis	13
Averill v. Hedge	209	v. Porter	680
Az��mar v. Casella	202, 321, 322, 346, 360	Barrow v. Arnand	545, 600
B.		Barry v. Coombe	530
Babcock v. Eckler	108	Bartemeyer v. Iowa	652
v. Gill	38	Bartholomew v. Bushnell	612, 634
Bach v. Owen	205, 510, 604	v. Markwick	552, 555
Backenstoss v. Stahler	665, 668	v. Warner	331, 383
Backenstoss v. Speicher	637	Bartlett v. Blanchard	600
Backhouse v. Harrison	23	v. Pearson	684
Bagueley v. Hawley	382, 388	v. Purnell	538, 671
Bahia, &c. R. R. Co. <i>In re</i>	567	Barton v. Gainer	75, 96
Bailey v. Colby	710, 712	Barwick v. English, &c. Bank	635
v. Ogden	519	Bascom v. Manning	613
v. Smith	230, 235, 245	Bateman v. Pinder	692
v. Sweeting	448, 449, 517, 525	Bates v. Coster	464
v. Walford	632	v. Kempton	76, 96, 137, 158
Baily v. De Crespigny	280, 284	Batterbury v. Vyse	283
Bakeman v. Pooler	429	Batut v. Hartley	699
Baker v. Hall	299	Baucum v. Streater	689
v. Henderson	328, 335	Baxter v. Bailey	84, 132
v. Hoag	13	v. Duren	324
v. Squier	332	v. State	690
v. Williams	120	Beach v. Schmultz	45, 46, 49
Baldehy v. Parker	464, 466, 482, 492	Beak's Estate, <i>In re</i>	138
Baldwin v. Bank of Newbury	535	Beak v. Beak	140, 162, 163
v. Ely	682	Beals v. Olmstead	321, 328, 337, 340, 356, 361
v. Van Deusen	324	Bean v. Simpson	680
v. Williams	479	Beardslee v. Richardson	698
Ball v. Larkin	678	Beauchamp v. Powley	697, 701
v. Liney	702	Beaumont v. Brengeri	497, 505
Ballard v. Burgett	297, 298, 299	Beck v. Sheldon	226
Ballentine v. Robinson	550, 555	Beckwith v. Cheever	213, 215
Baltzen v. Nicolay	539, 664	Bedell v. Carl	74
Banfield v. Whipple	707	Beecher v. Mayall	653
Bangs v. Hall	692	Beeckman v. Montgomery	111
Bank of Mobile v. Meagher	18	Beers v. St. John	33, 39, 40
Bank of United States v. M'Kenzie	691	Begole v. McKenzie	236
Bank of Valley v. Gettinger	679	Behn v. Burness	275
Bank v. Williams	138, 142, 159	Beirne v. Dord	370, 371
Bankart v. Bowers	307	Belden v. Meeker	681
Bannerman v. White	320, 321, 322, 361	Belford v. Crane	107, 109
Barber v. Meyerstein	583	Bell v. Cafferty	324
v. Taylor	416	v. Moss	587
Barclay v. Tracy	664	Beller v. Block	670
Barker v. Bates	18	Bellows v. Denison	705
v. Dinsmore	203, 639	v. Wells	193, 194
v. Hodgson	279, 280, 285	Belsharr v. Bush	692
v. Roberts	705	Bement v. Smith	260, 545, 550
		Bemis v. Morrill	237
		Benedict v. Field	317, 318, 435
		v. Schaettle	589

Bennett v. Judson	635	Bolden v. Brogden	347
v. O'Brien	706	Bolding v. Reed	195
Benny v. Rhodes	439	Bolton v. Lancashire, &c. R. R.	588, 593, 594
Bentall v. Burn	401, 503, 504	Co.	230, 242
Benton v. Jones	109	Bond v. Greenwald	18
Bergheim v. Iron Co.	407, 604, 619	v. Whitfield	631
Berndston v. Strang	590, 596, 598	Bondurant v. Crawford	547, 600
Berry v. Berry	81, 116	Boorman v. Nash	330
Bethel Steam Mill Co. v. Brown	240	Boothby v. Scales	19
Betts v. Francis	89, 92	Boothe v. Fitzpatrick	165, 173, 177,
v. Lee	32, 36	Borneman v. Sidlinger	181
Bexwell v. Christie	656, 667	Borrekins v. Bevan	321, 359
Bianchi v. Nash	421	Borries v. Hutchinson	602, 603
Biddle v. Carraway	113	Bos v. Helsham	200
v. Levy	640	Boston & Maine R. R. Co. v. Bart-	
Bigelow v. Huntley	299	lett	215
Bigg v. Whisking	464	Boswell v. Green	236, 237, 254, 414
Bigge v. Parkinson	342, 359, 366, 380	Boudreau v. Boudreau	88
Bigler v. Hall	230, 286	Boulton v. Jones	203, 623
Bigley v. Risher	199	Bourne v. Fosbrooke	71
Bill v. Bament	449, 488, 518	v. Seymour	407
Bird v. Boulter	538, 657	Boutts v. Ellis	142, 143, 165, 167
v. Brown	587, 592	Bowen v. Burk	302, 582
Birge v. Edgerton	254, 266	v. Owen	430
Bishop v. Holcomb	679, 680	Bowers v. Anderson	464
v. Honey	644	Bowker v. Hoyt	218
v. Shillits	281, 292, 293	Bowman v. Coffroth	649
Bissell v. Balcom	508	Bowry v. Bennet	644
Bixter v. Saylor	188, 642	Boyd v. Eaton	645
Black v. Bakers	586	v. Rockport, &c. Mills	677
v. Jones	22	v. Siffkin	316, 318
v. Thornton	100, 101	Boylan v. Leonard	680
v. Zacharie	675	Brackenridge v. Holland	46
Blackburn v. Smith	627	Brackett v. Edgerton	643
Blackmore v. Bristol, &c. R. R. Co.	706	v. Waite	107, 108
v. Shelby	195	Bradford v. Peckham	651
Blair v. Forehand	19	Bradley v. Hunt	158
Blake v. Lowe	169	v. Kingsley	666
Blakey v. Blakey	84	Brady v. Oastler	603
Blanchard v. Page	256, 263	v. State	680
v. Sheldon	81	v. Todd	329, 330, 331
Bland v. Maccolloch	89	Brand v. Focht	301, 486, 501
v. Womack	698	Brandon v. Nesbitt	648
Blasdel v. Locke	77	Brandt v. Bowlby	268, 292
Bleeker v. Graham	664, 670	Brasher v. Davidson	549
Blenkinsop v. Clayton	508	Breed v. Hurd	430
Blin v. Pierce	675, 683	Brehen v. O'Donnell	229, 306, 307,
Bliss v. Schaub	702, 710		425
Blood v. French	331, 383	Brent v. Green	463, 464
Bloomer v. Bloomer	179	Brewster v. Brewster	693
Blount v. Burrow	144	Bridges v. Hawkesworth	14-16
Bloxam v. Morley	558, 559	Briggs v. Dorr	678
v. Sanders	306, 399, 558, 559	v. Light Boat	248, 262
Bloxame v. Williams	653	v. Penny	117
Blum v. Marks	589, 597	Brigham v. Maxey	383
Blyth v. Carpenter	705	Brighty v. Norton	425
Boardman v. Spooner	333, 342, 503,	Brinckerhoff v. Lawrence	90
	523, 540	Brink v. Gould	87, 116
Bodurtha v. Phelon	349, 350, 613	British Columbia Saw-mill Co. v.	
Bogan v. Finlay	71	Nettleship	602
Boinest v. Leigneze	671	British, &c. Tel. Co. v. Colson	211
Bold v. Rayner	540		

Cary v. Bancroft	432	Clapp v. Nelson	712
Case v. Dennison	163, 167, 172, 175	Clark v. Bamer	634
v. Phelps	110, 111	v. Bulmer	476
Cash v. Hinkle	406	v. Boyd	676
Cason v. Cheely	459	v. Depew	105
Cassell v. Backrack	229, 306, 425	v. Draper	559, 581
Castle v. Playford	238, 240, 242, 265, 427	v. Duffey	403
v. Sworder	486, 492, 496, 505, 506	v. French	110
Castrique v. Imrie	644	v. Hornbeck	17
Caswell v. Hill	103, 109	v. Iowa City	689
Cathcart v. Keirnaghan	538	v. Jack	709
Catling v. Skoulding	691	v. Lewis	19
Caton v. Caton	516, 530, 532	v. Lynch	589, 597
Catterall v. Hindle	439	v. Neufville	632
Chadsey v. Green	350, 351	v. Nichols	460
v. Lewis	678	v. Smythies	659, 660
Chaffin v. Kimball	100	v. Wells	292, 295, 299
Chalmers, <i>Ex parte</i>	435, 548	Clarke v. Dickson	622, 627, 632, 633
v. Harding	336	v. Hutchins	412
Chamberlain v. Cobb	699, 701, 706	v. Poozer	709, 710
v. Dickey	308	v. Spence	262, 264
v. Smith	313	v. Thompson	684
Chambers v. Keene	685	v. Westroppe	200, 233
v. Spencer	107	Clason v. Bailey	530, 539, 540
Champion v. Plummer	519	Clay v. Crowe	18
v. Short	207	v. Yates	456, 457, 458, 459
Champney v. Blanchard	163	Clayton v. Andrews	452
Chandeler v. Lopus	355	Clement, &c. Man. Co. v. Meserole	546, 547
Chandler v. Fulton	587, 592, 597, 598	Clements v. Moore	103
v. Johnson	646	Cleveland v. Martin	678
Channon v. Lusk	43	v. Sterrett	315
Chanter v. Hopkins	320, 327, 361, 368	Clodfetter v. Cox	679
Chaplin v. Clarke	207	Clough v. London, &c. R. R. Co.	639, 641
v. Rogers	408, 497, 501, 504	Coates v. Railton	591
v. Warner	616	v. Stevens	347
Chapman v. Brooks	681	Cobb v. Arundel	268
v. Butler	687	Coburn v. Ware	614
v. Gwyther	336	Cocker v. Franklin, &c. Co.	402
v. Haley	683	Coddington v. Goddard	520, 524, 527, 534, 539, 540, 542
v. Ingram	545, 548	v. Paleologo	404
v. Morton	421, 422	Codman v. Rogers	689
v. Searle	343, 348	Coffinan v. Hampton	671
v. Shepard	246	Coggill v. Hartford, &c. R. R. Co.	297, 298, 299
v. Speller	383, 388	Colchester v. Law	26
Chappell v. Cox	46, 48	Cole v. Kerr	442
Chase v. Corcoran	12, 13	v. Mann	293, 295, 296
v. Redding	137, 158, 181	Coleman v. Gibson	498
v. Washburn	44, 704	v. Parker	153, 155, 156
Chevallier v. Wilson	153	Coles v. Bowne	539
Chicago v. Greer	5 6	Collins v. Bennett	700
Chicago Dock Co. v. Foster	638	Colson v. Arnot	24
Chicago, &c. R. R. Co. v. Dana	206, 215	Colt v. Cone	219
Chinery v. Viall	576, 600, 606	Columbus v. Howard	707
Chittenden v. Brewster	105	Colvin v. Weedman	315
Christmas v. Russell	675	v. Williams	478
Churchill v. Merchants' Bank	403	Colyar v. Taylor	697
v. Wells	109, 111, 112	Commonwealth v. Harnden	657
City Bank v. Rome, &c. R. R. Co.	272	v. Hutchinson	690

Commonwealth v. Passmore	656	Crane v. London Dock Co.	22
Comstock v. Affolter	412	Cranson v. Goss	653
Conard v. Atlantic Ins. Co.	583, 598	Cranz v. Kroger	98
Conawingo Co. v. Cunningham	403	Craven v. Ryder	565, 583
Concord v. Delaney	643, 644	Crawford v. Brooke	681
Concord Bank v. Gregg	636	v. Russell	648
Congar v. Chamberlain	328, 337, 339	v. Wick	650
Connor v. Trawick	84	Crawshay v. Edes	592
Conover v. Conover	692	Creed v. Lancaster Bank	680
Conway v. Walling	669	Creekmore v. Chitwood	648
Constantia, The	589	Crocker v. Gullifer	312, 313
Conway v. Bush	578	Crofoot v. Bennett	199, 235, 263
v. Cutting	675	Croft v. Alison	708
Conway Bank v. Am. Express Co.	697	Crommelin v. N. Y. &c. R. R. Co.	580
Conyers v. Ennis	589, 594	Crookshank v. Burrell	459, 480
Cook v. Addison	47	v. Rose	645
v. Bell	684	Cropper v. Cook	540
v. Cook	689	Crosby v. Wadsworth	468
v. Gilman	627	Cross v. Eglin	406
v. Holt	702	v. Gardner	337
v. Johnson	104	v. O'Donnell	413, 488, 507, 596
v. Mosely	349	Crossley v. Elworthy	112
v. Shipman	649	Crow v. Bell	116
Cooke v. Oxley	214, 215	Crowfoot v. Gurney	675
Coolidge v. Brigham	622, 627, 641	Crozier v. Young	105
Coombs v. Bristol, &c. R. R. Co.	496, 497	Crum v. Thornley	64, 130
v. Emery	651	Crump v. Mitchell	711
Cooper v. Bill	234, 504	v. U. S. Mining Co.	636
v. Burr	72, 120, 155	Cudworth v. Scott	39
v. Elston	453, 454	Cuff v. Penn	523
v. Landon	612	Cuming v. Brown	599
v. Phibbs	625	Cumins v. Wood	700, 708
v. Smith	523	Cummings v. Arnold	527, 528
v. Willomatt	709, 711	v. Fullam	684
Cope v. Rowlands	651	Cummins v. Griggs	236
Coppin v. Craig	670	Cunliffe v. Harrison	255, 404, 405
v. Walker	670	Cunningham v. Ashbrook	197, 199, 225, 238, 241
Corlies v. Cummings	439	v. Hall	379
Cornish v. Abington	567	Currie v. Anderson	496, 499
Cort v. Ambergate R. R. Co.	546	v. Steele	181
Cory v. Thames Iron Works Co.	603	Currier v. Howard	678
Cosnahan v. Grice	174	Curtis v. Groat	36
Costar v. Davies	433	v. Leavitt	644
Cotteen v. Missing	69, 81	v. Pugh	499
Cotterell v. Apsley	476	Cusack v. Robinson	488, 494, 496, 497, 507
Cotterill v. Stevens	510	Cushing v. Breed	44, 247
County of St. Charles v. Powell	691	Cushman v. Haynes	682
Couston v. Chapman	333, 419, 421, 422, 423, 426, 465, 606	v. Holyoke	237, 241, 368
Couturier v. Hastie	192	Cuthbert v. Wolfe	682
Covas v. Bingham	317	Cutter v. Powell	274, 276, 277, 278
Covell v. Hitchcock	590, 591, 593, 594	Cutting v. Gilman	156, 172, 173
Coventry v. Gladstone	593, 598	v. Grand Trunk R. R. Co.	602
Cowasjee v. Thompson	434, 533		
Cox v. Prentice	621, 627		
v. Sprigg	70		
Craig v. Harper	213		
v. Kittredge	82, 147		
v. Parkis	680		
Crain v. Paine	677		
Crane v. Gough	678		

D.

Dale v. Kimpton	680
Dame v. Baldwin	22
Damon v. Bryant	109
Dana v. Fiedler	600

<i>Dana v. Hancock</i>	528	<i>Dimmock v. Hallett</i>	668
<i>v. King</i>	276, 291	<i>Dingle v. Hare</i>	329
<i>Danforth v. Walker</i>	489, 493, 546, 547	<i>Ditson v. Randall</i>	638
<i>Darden v. Allen</i>	708	<i>Dixon v. Baldwin</i>	591
<i>Darnell v. Griffin</i>	229, 306	<i>v. Buell</i>	684
<i>Davidson v. Delano</i>	691	<i>v. Clarke</i>	428
<i>v. Nichols</i>	634	<i>v. Fletcher</i>	404
<i>Daviess v. Newton</i>	684	<i>v. Myers</i>	236
<i>Davis v. Barr</i>	682	<i>v. Yates</i>	227, 228, 230, 294, 396, 565, 581, 582, 588, 589
<i>v. Cary</i>	280	<i>Dodd v. Farlow</i>	331
<i>v. Commonwealth</i>	656	<i>Dodsley v. Varley</i>	493, 558
<i>v. Danks</i>	658	<i>Doggett v. Emerson</i>	625
<i>v. Eastman</i>	489	<i>Dole v. Lincoln</i>	182
<i>v. Hedges</i>	611	<i>v. Olmstead</i>	43, 44
<i>v. Herrick</i>	109	<i>Dolson v. Hope</i>	652
<i>v. Jones</i>	409	<i>Donath v. Broomhead</i>	592
<i>v. Shields</i>	513, 523, 530, 539, 542	<i>Donnell v. Donnell</i>	65
<i>v. Tallcot</i>	613	<i>Donovan v. Finn</i>	104
<i>Dawson v. Collis</i>	607	<i>Doolittle v. McCullough</i>	681
<i>v. Susong</i>	22	<i>Dorr v. Fisher</i>	391, 608, 612, 627
<i>Day v. Bassett</i>	305	<i>Dorsey v. Smithson</i>	112
<i>v. Pool</i>	608, 611	<i>Doty v. Wilson</i>	91, 120
<i>v. Raguet</i>	371	<i>Douglas v. Patrick</i>	430
<i>Daylight Burner Co. v. Odlin</i>	439	<i>Douglass, &c. Co. v. Gardner</i>	611
<i>Dean v. Dean</i>	89	<i>Dow v. Sanborn</i>	637
<i>v. Emerson</i>	650	<i>v. Worthen</i>	510
<i>v. James</i>	429	<i>Downer v. Thompson</i>	255
<i>v. Morey</i>	352	<i>Downs v. Belden</i>	301
<i>v. Yates</i>	638, 641	<i>v. Skillinger</i>	459
<i>Deane v. Keate</i>	707	<i>Dows v. Greene</i>	583, 598
<i>Dearle v. Hall</i>	679, 680	<i>Drake v. Redington</i>	711
<i>De Barry v. Withers</i>	684	<i>Dresser v. Dresser</i>	81, 82, 96, 166
<i>Decker v. Adams</i>	682, 683	<i>Dresser Man. Co. v. Waterston</i>	295,
<i>Deere v. Lewis</i>	600		297
<i>De Levillain v. Evans</i>	63, 85	<i>Drew v. Kimball</i>	570
<i>Delmotte v. Taylor</i>	128, 171, 173	<i>v. Spaulding</i>	19
<i>Demarest v. Wynkoop</i>	690	<i>Drury v. Defontaine</i>	653
<i>Dessaunier v. Murphy</i>	694	<i>v. Smith</i>	124, 152, 154, 165, 181
<i>Deming v. Foster</i>	355, 356, 368	<i>Duble v. Batts</i>	212
<i>Den v. De Hart</i>	107	<i>Duffield v. Elwes</i>	136, 137, 144, 148, 157, 158, 172, 184, 678
<i>Denew v. Daverell</i>	659	<i>Dugan v. Gittings</i>	690
<i>Dent v. Grath</i>	664	<i>Duke v. Asbee</i>	649
<i>De Pouilly, Succession of</i>	85	<i>Dumont v. Williamson</i>	324
<i>Des Arts v. Leggett</i>	18	<i>Duncan v. Magette</i>	703
<i>Deshon v. Bigelow</i>	295, 296, 299	<i>v. Topham</i>	402
<i>Devane v. Fennell</i>	235	<i>Duncans v. Stone</i>	292, 297
<i>Devaux v. Connolly</i>	628	<i>Duncuft v. Albrecht</i>	477
<i>Devol v. Brandt</i>	638	<i>Dunham v. Lee</i>	705
<i>Dewey v. Erie Borough</i>	310	<i>Dunlap v. Hunting</i>	703
<i>Dewitt v. Brisbane</i>	673	<i>Dunlop v. Grote</i>	550
<i>Dexheimer v. Gautier</i>	147	<i>v. Higgins</i>	209
<i>Dexter v. Norton</i>	230, 279, 286	<i>v. Lambert</i>	256, 412
<i>Dibbles v. Sheldon</i>	641	<i>Dunmore v. Alexander</i>	211
<i>Dickinson v. Burr</i>	684	<i>Dunn v. Branner</i>	698
<i>v. Gay</i>	332, 378	<i>Dunne v. Ferguson</i>	470
<i>v. McCarny</i>	687	<i>Dunning v. Stearns</i>	47
<i>v. Richmond</i>	653	<i>Dunwich v. Perry</i>	11
<i>v. Shee</i>	429	<i>Durrell v. Evans</i>	533, 534
<i>Dickson v. Zizinia</i>	342, 381	<i>Durst v. Burton</i>	634, 636
<i>Dill v. Ferrell</i>	608, 611	<i>v. Swift</i>	678
<i>Dillingham v. Smith</i>	45, 46		
<i>Dilts v. Stevenson</i>	73		

Dustan v. McAndrew	282, 547, 552, 577
Dutchess Co. v. Harding	319, 322, 361, 372, 373, 377, 423, 632
Dutton v. Solomonson	256
Dwight v. Whitney	439
Dyer v. Homer	674
v. Libby	230, 242, 295

E.

Earl of Falmouth v. Thomas	471, 472
Eastern Railroad v. Benedict	601
Eastman v. Patterson	699
v. Sanborn	707
v. Wright	679
Eaton v. Cook	588, 589
v. Lynde	38, 702
v. Munroe	32, 36
Eckstein v. Reynolds	430
Edan v. Dudfield	501, 502
Eden v. Blake	661
Edgerton v. Hodge	509
Edson v. Weston	698
Edwards v. Grand Trunk R. R. Co.	461, 473
v. Harben	642
v. Hodding	670
v. Jones	128, 148, 170
Egerton v. Egerton	66, 74, 160, 180
v. Mathews	522
Ehrensperger v. Anderson	428
Eichelberger v. M'Cauley	459
Eichholz v. Banister	387, 388, 389, 618, 622
Elam v. Keen	75
Elbinger Actien-Gesellschaft v. Armstrong	604
Elder v. Bradley	687
Elfe v. Gadsden	523
Eliason v. Henshaw	213
Ellershaw v. Magniac	268, 587
Elliott v. Edwards	262
v. Pybus	260
v. Thomas	311, 464, 487
v. Woodward	18
Ellis v. Deadman	517
v. Dunham	685
v. Hunt	408, 594
v. Mortimer	310
Elmore v. Kingscote	522
v. Stone	505
Elwell v. Chamberlin	635
Emmerson v. Claywell	685
v. Heelis	465, 537
Emmerton v. Matthews	357
England v. Lord Tredegar	18
Erie R. R. Co. v. Union Express Co.	645
v. Union Locomotive Co.	650

Erskine v. Messicar	690
Eskridge v. Glover	215
Esseistyn v. Weeks	694
Evans v. Roberts	468, 469, 470
Ewing v. Ewing	71
v. French	44

F.

Fairfield Bridge Co. v. Nye	248, 259, 261
Fairlee v. Denton	675
Falcke v. Gray	544, 605
Falk v. Fletcher	270
Fant v. Fant	685
Farebrother v. Simmons	536
Farina v. Home	498, 503, 583
Farlow v. Ellis	302, 306, 425
Farnam v. Brooks	687
Farquharson v. Cave	155, 164, 166
Farrar v. Nightingale	202, 204
Farwell v. Rogers	403
Faulkner v. Heberd	215
Faul v. Tinsman	682
Favene v. Bennett	440
Faxon v. Durant	94
Fay v. Wheeler	492
Fear v. Sykes	693
Feigley v. Feigley	103
Feise v. Wray	587, 588
Fells Point Savings Institution v. Weedon	18
Felthouse v. Bindley	204
Felton v. Hales	703
Fenner v. Tucker	666
Fenwick v. Phillips	693
Ferguson v. Carrington	637
Ferry v. Baxter	433
Field v. Brackett	707
v. Megaw	675
v. New York	679
v. Runk	465
v. Stearns	638
Fielder v. Starkin	609, 611
Fifield v. Elmer	292, 295, 299
Filkins v. Whyland	343
Filson v. Himes	646, 649
Fink v. Cox	69
Finley v. Quirk	653
First Nat. Bank v. Balcom	150
v. Crowley	248, 266
Fisher v. Knox	679
Fitch v. Burk	236
Fitzsimmons' Appeal	680
Fitzsimmons v. Joslin	636
Flanagan v. Hutchinson	196, 543
Flanigan v. Crull	670
Fleet v. Murton	542
Fletcher v. Peck	223
v. Tayleur	602
Flint v. Pattee	138, 139

Flint v. Wordin	657, 667	Gardiner v. Gray	365, 370
Florence Sewing Machine Co. v. Warford	21	v. Morse	666
Flynn v. Allen	685	Gardner v. Clark	426
Fobes v. Shattuck	43, 49	v. Gardner	182, 187, 175
Fogg v. Griffin	638	v. Grout	489
Foot v. Bentley	343	v. Hoeg	194
v. Marsh	245, 246	v. Howland	409, 583
Forbes v. Marsh	292, 295, 297, 300	v. Joy	460
v. Smith	690	v. Lane	191, 622
Ford v. Cotesworth	280, 285, 402	v. Merritt	63, 77, 85, 96
v. Ford	19	v. Parker	128, 144, 148, 150,
v. Garner	676, 677	157, 174	
Forkner v. Stuart	106	v. Smith	675
Forster v. Taylor	651	Garland v. Spencer	632, 634
Fortune v. Harris	706	Garman v. Cooper	411
Foster v. Essex Bank	699	Garnsey v. Gardner	678
v. Hall	105	Garvin v. Williams	65
v. Pettibone	38, 699, 705	Gass v. Simpson	147
Fowler v. Bush	433	Gassett v. Andover	432
v. Hollins	589	Gatling v. Newell	632, 633
v. Hunt	690	Gatzweiler v. Morgner	206, 415
v. Lock	709	Gault v. Brown	464, 487
Fox v. Harding	603	Gaunt v. Tucker	179
v. Webster	637	Gautier v. Franklin	687
Fragans v. Long	251, 256	Gay v. Hardeman	582
Francis v. Castleman	700, 702	Gaylord Man' Co. v. Allen	340
Franklin v. Long	191	Geary v. Physic	530
Franklyn v. Lamond	658	George v. Braden	612
Fraser v. Witt	598	v. Skivington	635
Frazier v. Harvey	340, 355, 356, 357,	Gelpcke v. Dubuque	645
380		Gerrish v. Sweetser	682
v. Hilliard	195	Gibbs v. Benjamin	236, 240
Freeman v. Cooke	567	Gibbons v. United States	549
v. Pope	104, 106, 108	Giblin v. McMullen	698, 699
French v. Raymond	163, 172, 175	Gibson v. Carruthers	586, 587
v. Vining	366, 631, 635	v. Cook	675
Frost v. Frost	127, 129	v. Holland	449, 515, 517
v. Knight	278, 546, 604	v. Stevens	329, 583
v. Woodruff	236	v. Tobey	294
Fryatt v. Sullivan Co.	40	Giddey v. Altman	296, 435
Fuller v. Abrahams	666	Giffert v. West	674
v. Bean	200, 236	Gifford v. Betts	610
v. Paige	47	Giles v. Edwards	628
Fulton v. Alexander	700	Gillard v. Brittan	576
v. Fulton	80	Gilleland v. Failing	96, 113
Furlong v. Polleys	600, 601, 615, 616	Gillespie v. Burleson	90
Furniss v. Ferguson	685	Gillett v. Campbell	678
		v. Hill	244
		Gilman v. Hill	482, 495
		Gilmour v. Supple	230, 234, 239, 286
		Gilpins v. Consequa	284
		Gilson v. Bingham	424, 609, 613
		Girard v. Taggart	669
		Gleason v. Drew	463
		Goad v. Johnson	358
		Goddard v. Binney	260, 265, 460
		Godowsky v. M'Farland	698
		Godts v. Rose	253, 255, 292, 294
		Godwin v. Francis	536
		Golder v. Ogden	245
		Goldsmith v. Bryant	296, 302, 303,
		306, 425	
G.			
Gaby v. Driver	670		
Galligan v. Fannan	647		
Gallup v. Josselyn	40		
Galway v. Fullerton	678		
Gammage v. Alexander	248, 260		
Gammar v. Borgain	337		
Gannett v. Cunningham	680		
Ganson v. Madigan	555		
Garbutt v. Bank	637		
v. Watson	454, 455, 459, 461		
Garden v. Bruce	688		

Hamilton v. Rogers	194	Hawes v. Watson	571
v. Singer Man. Co.	578	Hawkins v. Blewitt	70, 156
Hammett v. Linneman	305, 425	v. Chace	531
Hammond v. Anderson	241	v. Pemberton	321, 337
Hammonds v. Barclay	580	Hawley v. Keeler	446, 508, 509
Hamor v. Moore	127	Hayden v. Demets	409, 410, 411, 552
Hanauer v. Doane	643, 644, 646, 647,	Haynes v. Crutchfield	666
v. Gray	648	v. Thompson	684
v. Woodruff	645	Hays v. Mouille	589, 591, 593, 596
Hancock's Appeal	643	Hayslep v. Gymer	174
Handford v. Palmer	681	Hazard v. Loring	342, 429
Hands v. Burton	707	Head v. Diggon	215
Hannon v. State	188, 197	v. Goodwin	193, 194
Hanson v. Armitage	66	v. Tattersall	314, 611
v. Busse	499	Headley v. Kirby	133, 135, 136, 155
v. Edgerly	371	Heartley v. Nicholson	80
v. Meyer	626	Hebb's Case	207, 208, 212
	222, 229, 232, 233,	Hebb v. Hebb	150, 174
	305	Hedges v. Hedges	124
Hardacre v. Stewart	658	Heilbutt v. Hickson	222, 227, 230, 277,
Harding v. Coburn	46		375, 376, 377, 607
Hardman v. Booth	639	Heineman v. Heard	601, 602
Harlow v. Sparr	659	Helshaw v. Langley	530
Harman v. Reeve	480, 481, 483	Henderson v. Barnewall	534, 535, 538
Harmony v. Bingham	285	v. Henderson	92, 175
Harnett v. Baker	662	v. Lauck	292, 296, 307
Harnor v. Groves	628		202, 213
Harper v. Butler	684	Henkel v. Pape	677
Harrell v. Miller	473	Henley v. Bush	637
Harrington v. Rich	677	Hennequin v. Naylor	684
Harris' Case	209, 210, 211	Henry v. Brown	681
Harris v. Clark	138, 139, 141, 142,	v. Milham	693
	143, 159, 682	v. Thorpe	693
v. Johnson	342	Henshaw v. Robins	321, 340, 345,
v. Mills	687, 693		359, 362
v. Nickerson	660, 661	Hensley v. Baker	333
v. Pratt	591, 592, 599	Hepburn v. Auld	430
v. Runnels	651	Hepworth v. Hepworth	89, 117
Harrison v. Colton	653	Hercules Ins. Co., <i>In re</i>	679, 680, 683
v. Marshall	710	Herrick v. Borst	589
Hart v. Bush	497	v. Carter	188, 196
v. Carpenter	299	Hersom v. Henderson	343
v. Mills	217, 404, 420	Hesseltine v. Stockwell	48
v. Prendergast	687	Hewes v. Jordan	495, 498, 499
v. Ten Eyck	46	Hewitt v. Kaye	139, 140, 159
Hartford & N. H. R. R. Co. v.		Heyman v. Neale	534, 539, 540
Jackson	206, 709	Heyworth v. Hutchinson	318, 346,
Hartford Sorghum, &c. Co. v.			607
Brush	311	v. Knight	540
Hartley v. Tapley	193, 194	Hickok v. Buck	709
Hartt v. McNeil	638	Hicks v. Ayer	671
Harvey v. Stevens	519, 520, 530, 538,	v. Cleveland	509
	657	Higgins v. Chessman	235
Harwood v. Tucker	675	v. Senior	537
Hasbrouck v. Lounsbury	292, 295	Higgon v. Burton	639
Haskell v. Hunter	601	Higgs v. Warner	689
v. Rice	582	High v. Stainback	95, 120
Haslem v. Lockwood	9	High v. Ripley	459, 461
Haslock v. Ferguson	640	Hiort v. Bott	628
Hatch v. Atkinson	153, 155, 173, 184	Hildreth v. O'Brien	343
Haule v. Hemyng	289, 290	Hill v. Barney	18
Hawes v. Forster	540	v. Chapman	154
		v. McKenzie	295, 304

Hill v. Perrott	640	Haupt v. Shields	690
v. Smith	603	House v. Grant	180
v. Southwick	614	Houston, &c. R. Co. v. Mitchell	290
v. Spear	643	Howard v. Castle	667
Hillebrant v. Brewer	84	v. Emerson	358
Hills v. Hills	181	v. Harris	188
Himrod Furnace Co. v. Cleveland,		v. Savings Bank	77, 86, 96
&c. R. R. Co.	516	v. Steward	329
Hinckley v. Arey	539, 540	v. Williams	107
Hinde v. Gray	645, 650, 651	Howe v. Batchelder	473
v. Liddell	601, 602	v. Hayward	510
v. Longworth	108	v. Palmer	499
v. Whitehouse	191, 463, 488,	v. Ward	111
489, 511, 516, 518, 537, 539		Howell v. Biddlecorn	630
Hirschorn v. Canney	295, 299, 301,	v. Coupland	192, 230, 285
	303	v. Howell	693
Hirst v. Brooks	688	Howie v. Rea	615
Hitchcock v. Coker	651	Hoyt v. Holly	650
v. Hunt	612	Hubbard v. Bliss	391
Hoadley v. M'Laine	201, 522	v. George	373, 424
Hoare v. Rennie	288	Hudson v. Agee	19
Hobbs v. London, &c. R. R. Co.	545	Huff v. Earl	47
Hodge v. Manley	639	v. McCauley	473
Hodgson v. Davies	436, 437, 540	Huggins v. Perrine	112
v. Temple	644	Hughes v. Boyer	708
Hoe v. Sanborn	379, 380	Humaston v. Am. Telegraph Co.	196,
Hoereth v. Franklin Mill Co.	17		435
Hoffman v. Carow	20, 22, 23	Humble v. Mitchell	477, 479
v. Noble	637	Humfrey v. Dale	542
Hogins v. Plympton	320, 338	Humphries v. Carvalho	215, 310
Holbrook v. Burt	681	Hunt v. Butterworth	97
v. Hyde	41	v. Hecht	496, 497, 498
Holden v. Clancy	380, 384	v. Philadelphia	656, 659
Holley v. Adams	141	v. Wyman	309, 311, 312, 314,
Holliday v. Atkinson	139, 140		705
v. Morgan	347, 352	Hunter v. Hunter	689
Holloway v. Millard	111, 112	v. Leavitt	498
Holmes v. Hoskins	487, 492, 498	v. Nolf	649
v. Wood	331	v. Starkes	694
Holroyd v. Marshall	195	v. Wright	268, 411, 414, 507
Hooker v. Eagle Bank	674, 684	Huntington v. Bobbitt	692
v. Knab	451, 459	v. Porter	683
Hooper v. Goodwin	74	Hurd v. West	38, 704, 705, 711,
v. Stevens	691		712
Hoopes v. Strasburger	627	Hurst, <i>In re</i>	677
Hoover v. Tibbitts	594	v. Beach	137, 157, 175
Hope v. Hutchins	118	Hurt v. Wilson	680
Hopkins v. Hitchcock	362	Huson v. Pitman	681
v. Tanqueray	328, 355	Hussey v. Thornton	298
v. Ware	434	Hutchings v. Munger	302, 305, 308,
Horn v. Batchelder	218		437
v. Thompson	681	v. Nunes	587
Horncastle v. Farran	581	Hutchinson v. Bowker	206
Horne v. Midland R. R. Co.	603	v. Gordon	671
Horry v. Glover	30	v. Hunter	235, 245
Horsfall v. Thomas	631	Huthmacher v. Harris	625
Horton v. Green	328, 336, 343	Hutley v. Hutley	650
v. McCarty	538	Hutton v. Pearce	200, 282
Hotchkiss v. Finan	644	Hyatt v. Boyle	368, 369, 608
v. Hunt	299	Hyde v. Cookson	36
Hotham v. East India Co.	277	v. Lathrop	235, 254, 307
Hough v. Barton	18	Hyland v. Paul	707

I.

Iage v. Bossieux	684
Ibottson v. Peat	19
Idle v. Thornton	316
Iley v. Frankenstein	312
Inglebright v. Hammond	36, 44
Inglis v. Usherwood	594
Ireland v. Livingston	318, 319, 407
Irish v. Nutting	68, 120, 147, 152, 153
Irons v. Smallpiece	152
Irvine v. Stone	483
Isherwood v. Whitmore	413, 420
Ives v. Stirling	58, 69

J.

Jack v. Davis	682
Jackson v. Allaway	291
v. Nichol	593
v. Robinson	707
v. Seward	107
v. Turquand	207
v. Wetherell	629
Jagers v. Griffin	608, 610
James v. Griffin	593
v. Morgan	284
James River, &c. Co. v. Littlejohn	684
Jameson v. Gregory	312, 652
Janvrin v. Maxwell	505
Jaques v. Golightly	644
Jemmison v. Gray	553, 600, 601
Jendwine v. Slade	344
Jenkins v. Beetham	200, 282
v. Jarrett	229, 306
v. Motlow	697
v. Steanka	45
v. Temples	650
Jenkyn v. Vaughan	112
Jenkyns v. Usborne	587
Jenner v. Smith	254, 255
Jenness v. Wendell	465, 483, 487
Jessel v. Bath	583
Jewell v. Porter	96
Jewett v. Dockray	680
Johnson v. Buck	518, 537, 538, 657, 660
v. Cuttle	497
v. Dodgson	518, 580
v. Eicheberger	294
v. Hunt	40, 259, 263
v. Irby	684
v. Macdonald	316
v. Smith	681
v. Stevens	69, 98
v. Stoddard	269, 412
v. Zane	111
Jonassohn v. Young	287
Jones v. Barkley	274, 275
v. Bowden	333, 631

Jones v. Bright	366
v. Brown	131
v. Flint	468, 469
v. Franklin	640
v. Huggefard	680
v. Just	355, 357, 366, 367, 368, 615
v. Lock	79, 80, 83, 99
v. Mechanics' Bank	497
v. Moore	51
v. Page	709
v. Pearce	236
v. Richardson	193
v. Selby	124, 126, 154, 178
v. Smyth	17
v. St. John's College	285
Jordan v. Norton	206
v. Parker	637, 638
Joslin v. Cowee	641
Josling v. Kingsford	321, 360
Joyce v. Swan	201, 207, 270
Junkins v. Simpson	633
Justice v. Lang	513, 515, 517, 532

K.

Kain v. Old	342
Kane v. Bloodgood	680
Kaye v. Brett	438
Kearney v. Taylor	666
Kearon v. Pearson	279, 284, 285
Keeler v. Vandervere	236
Kein v. Tupper	217, 236, 408, 420
Keithler v. Foster	689
Kekewick v. Manning	79
Kellogg v. Barnard	370
v. Denslow	611
v. Krauser	680
Kelly v. Roberts	219
Kelner v. Baxter	537
Kelsea v. Haines	241
Kemp v. Farlow	698
Kemper v. Kemper	165, 169
Kempson v. Boyle	540
Kendall v. United States	673, 676
v. Wilson	203, 631
Kennedy v. Ashcraft	706
v. Panama Mail Co.	624, 626
v. Parke	681
Kenney v. Public Administrator	173
Kent v. Buck	705
v. Riley	108
Kenworthy v. Schofield	463, 535, 539, 664
Kerr v. Seaver	19
Kershaw v. Ogden	240
Ketchum v. Bank of Commerce	621
v. Foot	682
Key v. Cotesworth	268
Keys v. Harwood	197
Kidd v. King	439

Kiddell v. Burnard	347, 352	Latham v. Morrow	667
Kidder v. Kidder	71, 74	Laughlin v. Fairbanks	681
Kidderminster v. Hardwick	670	Lawrence v. Bartlett	132
Killmore v. Howlett	473	v. State	14, 15
Kilnitz v. Surry	489	Lawson v. Lawson	124, 139, 144, 150
Kimball v. Huntington	683	Lawton v. Keil	328, 608
Kimberly v. Patchin	48, 246, 247	Leach v. Francis	105
Kincaid v. Eaton	15	Leahi v. Dugdale	683
King v. Coulter	693	Leatherdale v. Sweepstone	429
v. Eagle Mills	626	Leather Cloth Co. v. Hieronimus	449,
v. Humphreys	705	515, 517, 529	
Kingsbury v. Taylor	340, 356, 380, 634	v. Lorsont	650
Kingsford v. Merry	25, 638	Leathers v. Carr	682
Kingsley v. Holbrook	470, 473	Leavitt v. Leavitt	105
Kinloch v. Craig	588	Leavy v. Kinsella	696
Kinney v. Kiernan	641	Leddel v. Starr	65
Kirk v. Gibbs	280	Ledwich v. McKim	323, 324
Kirkpatrick v. Alexander	290	Lee v. Bayes	22
Kline v. Baker	637	v. Boak	137, 157
Knight v. Abbott	429	v. Griffin	456, 457, 458, 459
Knights v. Wiffen	247, 411, 414, 568,	v. Kimball	599
570, 571		v. Luther	69
Knoblauch v. Kronschnabel	495	v. Wilmot	692
Knott v. Hogan	73, 82, 121	Leffingwell v. Warren	693
Knowles v. Atlantic, &c. R. R. Co.	700	Leggat v. Sands' Ale, &c. Co.	332,
v. Dabney	279, 280	333, 341, 367	
Kohler v. Hayes	705	Leighton v. Stevens	298, 300, 302
Kottwitz v. Alexander	644, 646	Lemon v. Phoenix Mut. Life Ins.	
Kreuger v. Blanck	318, 407	Co.	74, 95
Krulder v. Ellison	256	Leonard v. Davis	230
Kugler v. Taylor	683	v. Fowler	372
Kuhn v. Stansfield	109	Lerned v. Wannemacher	513, 515,
		516, 518	
L.		Leroux v. Brown	451
		Lerow v. Wilmarth	114
Labouchere v. Dawson	651	Lespard v. Van Kirk	366
Ladd v. Dillingham	646	Levasser v. Washburn	690
Ladue v. Branch	19	Leven v. Smith	296
Lafonde v. Ruddock	690	Levi v. Levi	666
Lagrange v. Barrè	99	Levy v. Green	255, 405
Laidlaw v. Organ	640	Lewis v. Bannister	642
Laidler v. Burlinson	263	v. Berry	675
Lake v. Morris	401	v. Hoblitzell	685
Lamb v. Crafts	361, 460	v. Peake	616
Lambert v. Overton	137, 161	v. Swift	266
Lamert v. Heath	324, 622	Lewton v. Keil	335
Lamond v. Duvall	576, 661, 662	Lacey v. Lacey	677
Lampley v. Scott	698	Lickbarrow v. Mason	583, 586, 587,
Lamson v. Patch	411	598	
Lance v. Lance	118	Liddard v. Kain	350, 351
Lane v. Kennedy	691	Like v. McKinstry	659
Lange v. Werk	645, 650, 651	Lillywhite v. Devereux	502
Langley v. Berry	681	Lindsay, <i>In re</i>	262
Langridge v. Levy	635	Lindsey v. Miller	690
Langton v. Higgins	234, 252	Lingham v. Eggleston	235, 236
v. Hughes	647, 648	Linnendoll v. Doe	70
L'Apostre v. L'Plastier	387	Linsenbigler v. Gourley	119, 147
Larason v. Lambert	688	Litt v. Cowley	595
Larkins v. Eckwurzlel	688	Little v. Page	229, 292, 295
Larned v. Andrews	651, 652	v. Willetts	106
Lassiter v. Ward	633	Livingston v. Byrne	668
		Llansamlet Tin Plate Co.	604

Lobdell v. Baker	324	Marble v. Moore	235
Lobenstein v. Pritchett	698	Marden v. Babcock	105, 106
Lockhart v. Barnard	21	Margetson v. Wright	350, 351
Logan v. Le Mesurier	230, 234, 242, 286	Marine Bank v. Wright	268, 271
v. Mathews	708	Markland v. Creditors	591
Lomi v. Tucker	344	Marland v. Stanwood	405
London, &c. R. R. Co. v. Bartlett	592	Marner v. Banks	710
Lonergan v. Stewart	38, 44, 704	Marsh v. Fuller	72, 96, 113
Long v. Hickingbotham	390, 391	v. Hyde	446, 488
Lonsdale's Estate	681	v. Jelf	656
Loomis v. Loomis	679	v. Rouse	485, 486, 503
Loop v. Litchfield	380, 634	v. Webber	635
Lord v. Grow	340, 356, 361, 380	Marshall v. Berry	125, 131, 133
v. Price	605	v. Lynn	523
v. Shaler	692	Marston v. Knight	608
Lorymer v. Smith	319, 419	v. Marston	95, 116
Lounsbury v. Depew	173	v. Seabury	693
Lovatt v. Hamilton	316	Martin v. Adams	219
Low v. Martin	45	v. Black	213
v. Pew	194	v. Cuthbertson	702
Lowery v. Gear	691, 692	v. Martin	693
Lowndes v. Anderson	23	v. McMillan	647
Lowry v. Barelli	281, 426	v. Ramsey	84, 169
Loyd v. Malone	666	v. Ranlett	665, 666
Lucas v. Nichols	400	v. Wade	649
Lucy Ann, The	116	v. Youngblood	84
Lucy v. Mouffet	311	Martindale v. Booth	266
Lunn v. Thornton	194	v. Smith	553, 585, 596
Lunt v. Bank of North America	682	Martineau v. Kitching	229, 238, 240, 242, 265, 305, 425, 427
Lupton v. White	41, 46, 51	Martrick v. Linfield	89, 116
Lush v. Wilkinson	112	Marvin v. Wallis	486, 505
Lyman v. Cessford	110	v. Treat	16
Lynch v. Beecher	638	Mason v. Chappell	354, 366, 368
Lyon v. Bertram	608, 611, 622, 627, 628	v. Johnson	690
v. Strong	653	v. Thompson	235
M.		Massey v. Sladen	425
Maberley v. Sheppard	492, 498, 501	Massie v. Crawford	612
Macdonald v. Longbottom	524	Mather v. Chapman	13
Mack's Appeal	75	Mathews v. Feaver	105
Mackay v. Douglas	105, 108, 110, 111	Matteson v. Holt	632
Mackie v. Davis	685	Matthews v. Discount Corporation	553
Maclean v. Dunn	535, 540, 575	Mattice v. Allen	510
Mactier v. Frith	209, 210	Mattingly v. Nye	109
Magniac v. Thompson	59	Mattison v. Westcott	459
Magruder v. Gage	256, 257, 412	Mattocks v. Bellamy	688
Mahon v. Baker	66	Maxwell v. Brown	485, 495, 497
Mainprice v. Westley	657, 668	v. Houston	702
Mallan v. May	651	Mayer v. Clark	106
v. Radloff	344, 345, 356, 366	Mayfield v. Wadsley	471, 476
Mallory v. Willis	36	M'Andrew v. Chapple	275
Maltby v. Christie	656, 659	McAvoy v. Medina	14, 15
Manahan v. Noyes	632	McCandlish v. Newman	201
Mann v. Everston	366, 367	McCarthy v. Wolfe	699
Manning v. Albee	630	McClartey v. Gokey	404, 428
Manser v. Back	658	McClellan v. Scott	636
Manufacturers', &c. Bank v. Hazard	567	M'Cluney v. Lockhart	89
		McClung v. Kelley	235, 366
		M'Comb v. Wright	663
		McConihe v. New York, &c. R. R. Co.	38, 248, 260
		McConnel v. Murphy	328, 345, 406

McConnell v. Hughes	197, 198	Meredith v. Watson	175
v. McConnell	186	Merriam v. Field	219, 341, 342, 366
McCormick v. Dunville	611	v. Wolcott	323, 324
v. Hamilton	554	Merrimack Man. Co. v. Quintard	615,
v. Sarson	372, 424, 609		617, 619
McCrae v. Young	206, 219	Merritt v. Clason	530, 533, 535
M'Culloch v. Eagle Ins. Co.	209	v. Johnson	38, 39, 259, 261
McCutchen v. McCutchen	84	Merry v. Green	14, 15
M'Donald v. Crockett	89	Messmore v. N. G. Shot Co.	376, 602,
v. Hewett	234		608, 610
McDowell v. Russell	46	Metz v. Albrecht	306, 408, 414, 425,
v. Simms	665		605
M'Evers v. Steamboat Sangamon	707	Mews v. Carr	538
McEwan v. Smith	558, 561, 564, 565,	Meyerstein v. Barber	595
	566, 583	Michel v. Ware	391, 392
McEwen v. Morey	201	Michener v. Dale	123, 136, 146, 153,
McFarlane v. Taylor	647		154, 165, 179, 181
McGavock v. Puryear	644	Michigan Central R. R. Co. v. Phil-	
M'Gee v. Bast	698	lips	229, 298, 301
M'Gonnell v. Murray	76, 163	Middlesex v. Thomas	431, 433, 434
McHose v. Fulmer	600, 601, 602	Middlesex Co. v. Osgood	400, 446
McIniffe v. Wheelock	438	Miles v. Gorton	559
McIntyre v. Kline	248, 260	Milgate v. Kebble	576
M'Kane v. Bonner	95, 120	Milldam Foundry v. Hovey	280, 285
McKay v. Hamblin	415, 698, 704	Miller v. Desha	107
M'Kean v. Wagenblast	47	v. Eastman	90
McKee v. Garcelon	411, 583	v. Garman	266
McKenney v. Haines	705	v. Hoyle	680
McKenzie v. Downing	138, 159	v. Jeffress	127, 172
McKinney v. Alvis	684	v. McIntyre	687
McKnight v. Devlin	618, 645	v. Michoud	40
v. Dunlop	488	v. Miller	154, 158
McLaughlin v. Waite	24	v. Post	651
M'Lean v. Nicoll	446, 448, 515, 516,	v. Stevens	524
	523	Milliken v. Warren	581
McLeod v. First Nat. Bank	638	Millon v. Salisbury	707
v. Jones	401	Mills v. Bayley	282
McMasters v. Commissioners	669	v. Hunt	464, 465, 487, 658
M'Mechen v. Baltimore	656	v. Mills	649
McMechen v. Marman	105	Minchin v. Merrill	81
McMillan v. Bethold	18	Miner v. Bradley	633
McNamee v. United States	690	Minor v. Rogers	78, 95
McNaught v. Dodson	545	Minturn v. Main	670, 671
McNeal v. Emerson	401	Mirick v. French	58, 69
McNeills v. Brooks	707	Mitchell v. Gile	188
McWilliams v. Webb	675	v. Newhall	324
McWillie v. Van Vacter	84	v. Smith	164
Meach v. Meach	132, 133, 135, 136,	Mixer v. Colburn	354, 355
	169, 170	v. Cook	302
Mears v. London, &c. R. R. Co.	710	v. Howarth	460
Mebane v. Mebane	121	Moar v. Wright	684
Mechling's Appeal	127	Mody v. Gregson	373, 377
Medbury v. Watson	617	Mohawk Bank v. Atwater	105
Meek v. Kettlewell	79	Mohr v. Boston, &c. R. R. Co.	591, 592
Mehlberg v. Fisher	434	Mollett v. Robinson	542
Melledge v. Boston Iron Co.	433	Moncrief v. Goldsborough	667
Meldrum v. Snow	312, 315	Mondel v. Steel	607, 609, 611, 612,
Mercantile, &c. Bank v. Gladstone	597		613, 614
Merchant v. Merchant	128, 177, 178	Montague v. Lobdell	684
Merchants' National Bank v. Bangs	254, 257, 268	Monte Allegre, The	331
	413, 498, 499	Montefiori v. Montefiori	643, 645
Meredith v. Meigh		Montgomery v. Edwards	446

TABLE OF CASES CITED.

xxxix

Moody v. Brown	260	Myers v. Davis	684
v. Kyle	675	v. Meinrath	643
v. Wright	194	v. South Feather, &c. Co.	683
Moers v. Larry	707		
Mooklar v. Lewis	614, 615	N.	
Moore v. Bowman	48, 50	National Bank v. Sprague	110, 666, 667
v. Campbell	406, 528, 539	Nat. Bank of Commerce v. Merchants' Nat. Bank	271
v. Darton	125, 131, 137, 163, 167, 175	Nat. Fire Ins. Co. v. Loomis	663
v. Erie Railway Co.	51, 52	Naylor v. Dennie	593
v. Gwyn	88	Negus v. Simpson	712
v. Lowrey	677	Neill v. Whitworth	288
v. Metropolitan Nat. Bank	679	Neldon v. Smith	317, 318, 402, 407
v. Moore	74, 80, 137, 159, 160	Nelson v. Aldridge	671
More v. Bonnet	646, 650, 651	Nesbit v. Burry	236, 510
Morehead v. Hunt	665, 667	v. Lockman	65
Morgan v. Bain	653	Neufville v. Thomson	81
v. Gath	405	Nevill, <i>In re</i>	312, 315
v. Gregg	43	v. Hancock	677
v. Matteson	79, 85	Newbery v. Wall	356
v. Rowlands	691	Newby v. Rogers	403
v. Taylor	411	Newcombe v. Leavitt	693
Morley v. Attenborough	381, 383, 385, 386, 387, 389	Newell v. Radford	520, 524
Morrill v. Wallace	337	Newhall v. Page	699
Morris v. Rexford	292, 293	v. Vargas	586, 587, 588, 590, 595, 596
Morrison v. Mullin	689	Newlan v. Dunham	282
Morrow v. Reed	235, 236	Newman v. Kettell	688
Morse v. Androscoggin, &c. R. R. Co.	702	Newsom v. Hart	19
v. Brackett	372, 608, 612, 621, 628	v. Thornton	588, 589
v. Crawford	699, 712	Newton v. Bronson	533, 535
v. Rathburn	630, 632	New York v. Colgate	693
v. Reed	19	N. York, &c. R. R. Co. v. Schuyler	636
v. Sherman	230	Noakes v. Morey	510, 535
Morse Twist Co. v. Morse	650	Noble v. Smith	69, 70
Mortimer v. Bell	667	v. Ward	447, 528
Morton v. Dean	463, 539, 664	Nolin v. Blackwell	693
v. Tibbett	496, 497	Norris v. Blair	539
Moses v. Mead	355, 358	North v. Griffin	479
Moss v. Sweet	276, 312	North British Ins. Co. v. Moffatt	240
Mottram v. Heyer	592	Northey v. Field	592
Moufflet v. Cole	651	Northrup v. Cook	545, 600
Moulton v. Scruton	615	v. Foote	653
Mount v. Lyon	307	Norton v. Colby	692
Mount Hope Iron Co. v. Buffinton	260	v. Nye	9
Mowry v. Todd	677	Noyes v. Brown	678
Mt. Olivet Cemetery v. Shubert	684	Nicholas v. Adams	123, 145, 146, 169, 177, 178
Mucklow v. Mangles	248, 259, 261	Nichols v. Edwards	88, 89, 90
Mudge v. Oliver	623	v. Godts	321, 322, 360
Mullen v. Wilson	111	v. Michael	641
Muller v. Eno	611, 615, 616	v. Morse	486, 554
Mulvany v. Rosenberger	350	v. Pinner	637
Mumford v. Gething	650	Nicholson v. Bower	495, 499
Mundorff v. Wickersham	636	v. Bradfield Union	404, 405
Murdock v. Finney	679	v. Gooch	647
Murphy v. Boese	533, 534	Nicolls v. Bastard	710
v. Simpson	653	Nutter v. De Rochemont	690
Murray v. Baker	690	Nutting v. Dickinson	282
v. Coster	687		
Murry v. Meredith	615		

O.

Oakes v. Turquand	631, 635, 636
Oakland v. Carpentier	687
Obermeier v. Core	582
O'Brien v. Norris	589, 597
O'Conner v. Varney	613
O'Daniel v. Crawford	107
Odell v. Boston & Me. R. R.	241, 256
Odenheimer v. Douglass	677
O'Donnell v. Allen	617
v. Leeman	463, 523
Ogg v. Shuter	268, 272
Ogle v. Atkinson	270
v. Earl Vane	528
Ohio Life Ins. Co. v. Ross	682
Okell v. Smith	311
Olds v. Cummings	678
Ollivant v. Bayley	203, 268
Olyphant v. Baker	227, 230
O'Neill v. James	407
Oppenheim v. Russell	597
Ormerod v. Huth	386
Ormsbee v. Machir	245
Orr v. Bigelow	555
Orser v. Storms	710, 711
Ortman v. Green	357
Otley v. Lines	105
Outcalt v. Durling	581
Overton v. Sawyer	137
Owens v. Miller	682
Owenson v. Morse	433
Oxendale v. Wetherell	217, 405, 406, 426

P.

Pacific Iron Works v. Newhall	366, 384
Padden v. Marsh	313
Paddock v. Stobridge	630, 631
Page v. Cowasjee Eduljee	382, 388, 575, 576, 578, 654
v. Dickerson	631
Paine v. Dwinell	433
Palmer v. Hatch	330
v. Rouse	12, 13
Pappa v. Rose	332
Pards v. Bingham	690
Parish v. Murphree	105, 108, 109, 111
v. Stone	138, 141, 159
Parker v. Byrnes	592
v. Kelly	683
v. Kückens	26
v. Palmer	371, 421
v. Marston	178
v. Nolan	618
v. Ricks	81, 85
v. Staniland	468
v. Wallis	496
Parkman v. Welch	107, 110

Parkinson v. Lee	340, 355, 356, 371, 380, 381
Parks v. Innes	679
v. Morris, &c. Co.	329, 341, 608
Parmelee v. Cameron	681
Parsons v. Hill	63
Partelo v. Harris	105
Parton v. Crofts	513, 540
Pasley v. Freeman	334, 337
Pass v. McRea	678
Pate v. Wright	653
Paton v. Duncan	322
v. Rogers	622
Pattison v. Jenkins	630
Patton v. Hassinger	692
Paul v. Reed	292, 296, 297
Payne v. Cave	663
v. Powell	84
Peabody v. Bags of Cotton	12
Peacock v. Pursell	434
Pearce v. Blackwell	630
v. Brooks	644, 647, 648
v. Carter	601
Pearson v. Dawson	564, 565
v. Pearson	69
Pease v. Gloahec	583, 598, 638, 641
v. Norton	403
v. Sabin	354, 356, 366
Peck v. North Staffordshire R. R. Co.	516, 518
Pecker v. Kennison	646
Pedden v. Marsh	610
Peirce v. Corf	535, 538, 539
Pellecat v. Angell	648
Peltier v. Collins	523
Pembroke Iron Co. v. Parsons	406
Pender v. Fobes	342
Penfield v. Thayer	72, 76
Penn. R. R. Co. v. Titusville, &c. Co.	603
Pennington v. Gittings	69, 74, 160, 161, 175
Pennock v. Cœ	195
People v. Cogdell	25
v. Gilbert	690
v. Johnson	82
v. Walker	403
Perkins v. Cushman	18
v. Dacon	308
v. Douglas	312
Perley v. Balch	611, 614, 634
Perry v. Jackson	690
Persch v. Quiggle	698
Peters v. Ballistier	583
Peto v. Blades	659
Pettitt v. Mitchell	420
Phalen v. Clark	687
Phelan v. Andrews	612, 616
v. Crosby	640
Phelps v. Bostwick	703
v. McGee	601
v. Pond	69

Saunderson v. Jackson	515, 531	Shepherd v. Harrison	268, 270, 271, 272, 281, 294
Savage Man. Co. v. Armstrong	276	v. Kain	361
Savannah Nat. Bank v. Haskins	18	v. Pybus	369
Sawyer v. Joslin	591, 594	v. Trigg	106
Sayre v. Hughes	117	Shepley v. Davis	245
v. Wheeler	653	Sherk v. Endress	75
Scattergood v. Sylvester	21	Sherman v. Champlain Trans. Co.	390, 392
Schell v. Stephens	658, 664	v. Johnson	382
Schermerhorn v. Talman	652	Shindler v. Houston	499, 504
Schlesinger v. Stratton	312	Shinn v. Bodine	307
Schneider v. Norris	516, 531	Shireman v. Jackson	292, 295, 299
Scholefield v. Robb	352	Shirley v. Whitehead	131
School District v. Dauchy	285	Shorick v. Bruce	689
Schotsman v. Lancashire, &c. R. R. Co.	590, 596	Short v. Simpson	583
Schuchardt v. Allens	206, 207	Shotwell v. Webb	682
Schurtz v. Kleinmeyer	347	Shower v. Pilck	71
Schwoerer v. Boylston Market	275	Shufeldt v. Pease	638
Scott v. Eastern Counties R. R. Co.	455, 464, 487	Shumway v. Rutter	50
v. Harmon	650	Shurtleff v. Willard	401
v. Jones	683	Siewewright v. Archibald	513, 514, 540
v. Littledale	203	Siffkin v. Wray	587
v. Scholey	105	Sigourney v. Wetherell	691
v. Shreve	682	Silsbury v. McCoon	36, 37
v. Uxbridge R. R. Co.	430	Simmonds v. Humble	488, 497, 503
v. Warner	621	Simmons v. Swift	199, 222, 227, 228, 230, 233
v. Willson	13	Simon v. Motivos	463
Scovell v. Boxall	472	Simond v. Braddon	317
Scudder v. Bradbury	302, 303	Simpson v. Crippin	287, 288, 604
v. Worster	244, 245, 247, 414, 569, 570	v. Margitson	659
Scranton v. Baxter	706	v. Nicholls	653
v. Clark	383, 390, 392	v. Wrenn	710
Searight v. Calbraith	429	Sims v. Howell	366
Searle v. Keeves	503	v. Marryat	386, 390
v. Laverick	699, 700	v. Walker	167
Sears v. Shafer	689	Singleton v. Cotton	71
Sedgwick v. Stanton	649, 650	Skinner v. Somes	684
Seeger v. Duthie	275	Skipper v. Stokes	194
Seeley v. Seeley	684	Slater v. Maxwell	666
Seig v. Acord	692	Slaughter v. Green	44
Selby v. Selby	530	Sloane v. Van Wyck	575, 653
Sessions v. Moseley	68, 76, 82, 165, 173	Smeed v. Foord	602
Sewall v. Fitch	459	Smilie v. Stevens	684
v. Glidden	71, 84	Smith v. Bean	653
Sexton v. Wheaton	107, 109	v. Borst	336
Seybel v. Nat. Currency Bank	23	v. Dallas	219, 308
Seymour v. Davis	449	v. Dennie	302
v. Newton	587, 593, 595, 597	v. Dorsey	120, 147
v. Wyckoff	41	v. Downey	169
Sharman v. Brandt	536, 542	v. Gillett	400
Sharp v. Parks	23	v. Goss	597
Shattuck v. Green	390, 391	v. Greenlee	666
Shears v. Rogers	107	v. Hudson	489, 495, 496, 497, 499, 507, 591
Sheffer v. Montgomery	308	v. Hughes	203, 629, 630, 631, 632
Sheldon v. Cox	188, 197	v. Justice	328, 335, 338, 349
v. Sherman	40	v. Kay	65
Shelley v. Ford	709	v. Kittredge	138, 141
Shelton v. Livius	661	v. Lewis	202, 405
Shepardson v. Cary	414, 582, 583	v. Love	633

Smith v. Lynes	302	Staniford v. Tuttle	689
v. Maine	174	Staniland v. Willott	128, 148, 149, 177
v. Meegan	700, 701	Stanley v. Jones	650
v. Mercer	435	Stanton v. Austi	399
v. Miller	433	v. Bell	701
v. Milliken	489	v. Eager	596, 598
v. Montgomery	89	Star Glass Co. v. Morey	333, 613, 617,
v. Morrill	48		634
v. Myers	254, 317	Starr v. Starr	138
v. Neale	384	State v. Harvey	19
v. Neefus	533	v. Joiner	690
v. Newby	690	v. King	403
v. Reavis	109	v. Schulein	640
v. Richards	626, 631	Startup v. McDonald	404, 420
v. Rogers	682	Stead v. Dawber	528
v. Sanborn	41, 50	Stearns v. Hall	527, 528
v. Simms	691	Stedman v. Gooch	437
v. Smith	98, 154, 627	Steele v. Ellmaker	656, 657, 668
v. Stanton	518	v. Ward	105
v. Surman	472, 517, 523, 525	Stephens v. Orman	630
v. Tracy	331	v. Wilkinson	575, 653
v. Welch	46	Stephenson v. Hart	638, 639
Smoot v. United States	278, 283	v. Little	45
Snellgrave v. Bailey	76	Sterling v. Baldwin	473
Snelling v. Hall	315	Stevens v. Bowers	675
Snow v. Warner	497	v. Briggs	38
Snyder v. Christ	111	v. Curtis	19
Soames v. Spencer	535	v. Lee	671
Soles v. Hickman	523	v. Lyford	603
Somes v. British Empire Shipping Co.	580	Stevenson v. Newnham	641
South Australian Ins. Co. v. Randall	196	Stewart v. Ball	30
Southerland v. Southerland	136, 165, 166, 171, 175	v. Eddowes	528
Southern Life, &c Co. v. Cole	477	v. Emerson	637
Southwestern Freight Co. v. Plant	299, 306	v. Kirkland	680
v. Stanard	235, 559, 581	Stiles v. Farrar	674, 675
Spader v. Davis	104	v. White	634
Spain v. Hamilton	677	Stonard v. Dunkin	571
Spalding v. Ruding	598	Stone v. Browning	489, 492, 495
Spangler v. Eicholtz	699	v. Gerrish	127, 129
Sparkes v. Marshall	251	v. Hackett	74, 76, 94, 96, 120
Sparks v. Messick	341, 342	v. Perry	294, 295, 297, 303
Spartali v. Benecke	581	v. State	657
Spence v. Union Mar. Ins. Co.	41, 44, 45, 51, 53	v. Swift	583
Spencer v. Hale	497	Storer v. Gowen	698
v. Harding	660	Stout v. Stevenson	685
Spicer v. Cooper	524	Stovall v. Johnson	98
Spickler v. Marsh	312	Stoveld v. Hughes	564
Spiker v. Nydegger	678	Straus v. Herman	188
Spirett v. Willows	108, 110	v. Ross	235
Splawn v. Martin	105	Strauser v. Rosier	19
Spooner v. Mattoon	698	Street v. Blay	607
Spring v. Chipman	671	Strickland v. Turner	192, 621, 627
v. Gray	687	Strong v. Bird	90, 91
St. Louis Church v. Bonneval	656	v. Taylor	281
Staines v. Shore	667, 668	Strother v. The Hamburg	680
Stainton v. Wood	402	Stroud v. Pierce	338, 341
		Stucley v. Bailey	337, 341
		Sturges v. Crowninshield	60
		Sturtevant v. Orser	588, 594
		Suit v. Bonnell	424
		Sully v. Freat	622
		Summers v. Vaughan	328

Sumner v. Hamlet	39	Thomson v. Dougherty	111, 112
v. Jones	653	Thornburn v. Whitacre	284
Sumpter v. Tucker	678	Thorne v. Deas	698
Sutton v. Hawkins	430	v. Mosher	430
Sutton v. Campbell	291, 296, 308	Thornett v. Haines	667, 668
Suydam v. Clark	542	Thornton v. Charles	540
Swain v. Seamens	528	v. Kempster	202, 540
v. Shepherd	256	v. Wynn	611
Swanwick v. Sothern	238, 239	Thorold v. Thorold	168
Swayze v. Hull	649	Thorp v. Amos	131
Sweeting v. Turner	670	Thorpe v. Corwin	688
Sweetman v. Prince	681	Thrall v. Newell	324
Swett v. Shumway	362	Thurnell v. Balbirnie	282
Swift v. Moseley	709, 710	Thurston v. Maddocks	689
v. Stevens	17	v. Percival	645
Sykes v. Giles	669	Tigress, The	595
T.		Tillinghast v. Wheaton	76, 163, 184
Tamvaco v. Lucas	318, 406	Tillman v. Moseley	118
Tanner v. Scovell	582	Tipton v. Feitner	217
v. Smart	692	Tisdale v. Harris	449, 478, 479, 488
Tansley v. Turner	199, 234, 504	Todd v. Grove	64, 65, 66
Taplin v. Florence	665	Tome v. Dubois	20
Tappan v. Evans	104	Tomlinson v. Savage	668
Tate v. Hilbert	125, 139, 140, 158, 168	Tompkins v. Saltmarsh	698
v. Leithead	83, 144, 148	Tooke v. Hollingsworth	399
Tarling v. Baxter	230	Towers v. Osborne	452, 454
Tayloe v. Merchants' Fire Ins. Co.	209, 210	Towle v. Leavitt	667, 668
Taylor v. Blanchard	651	Town v. Trow	431
v. Bullen	361, 362	Townes v. Birchett	439, 669
v. Caldwell	192, 279, 285	Townley v. Crump	559, 560
v. Jones	50	Townsend v. Hargraves	446, 449, 450
v. McMurray	687	Torrance v. Bolton	625, 626, 662
v. Staples	69, 70, 73	Tracy v. Talmage	644, 651
v. Taylor	65, 169	Trapnall v. Burton	693
v. Wakefield	493, 502, 581	Treadwell v. Reynolds	421, 498
Tempest v. Killner	477	Treat v. Barber	46, 50
v. Fitzgerald	492, 498, 501	Tregelles v. Sewell	254
Tenbrook v. Brown	71	Trent, &c. Co., <i>In re</i>	701
Terry v. Bissell	324	Trevor v. Wood	212, 515, 536
v. Wheeler	206, 230	Tripp v. Armitage	259, 261, 263, 264
Tewkesbury v. Bennett	328, 335	v. Brownell	194
Thacher v. Phinney	108, 110	v. Riley	43
Tharp v. Tharp	687	Trist v. Child	649
Thayer v. Lyman	679	Trough's Estate	160, 164
Thetford v. Hubbard	429	Trueman v. Loder	535
Thomas v. Degraffenreid	88, 107, 109	Turley v. Bates	239, 240
v. Kerr	658, 669	Turner v. Harvey	640
v. Winchester	635	v. Liverpool Docks	270, 590
Thome v. Colton	48	v. Mucklow	357
Thompson v. Alger	508, 550, 555	Turney v. Dodwell	691
v. Baltimore, &c. R. R.	408, 411, 559, 563	Turpin v. Thompson	132
v. Gould	191	v. Turpin	63
v. Kelly	662, 670	Tuttle v. Brown	335, 339, 615
v. Menck	498	v. Holland	644
v. Ray	281, 282, 288, 292	v. Standish	18
v. Rose	637, 638	Twyne's Case	103
v. Thompson	132, 150, 589	Tye v. Finmore	345, 370
v. Woodruff	600	Tyers v. Rosedale, &c. Iron Co.	407
		Tyler v. Freeman	292, 294, 304
		Tyre v. Causey	612

U.

Udell v. Atherton	635
Ullmann v. Kent	547
United States v. Hoar	690
v. Wilder	691
Upton v. Wallace	684
v. Suffolk County Mills	329,
	330, 331

V.

Vail v. Halton	694
v. Strong	188
Vale v. Bayle	413
Valpy v. Gibson	591
v. Oakeley	560, 573, 575, 581,
	600
Van Casteel v. Booker	270, 588, 590
Vandenburgh v. Spooner	520
Van Deusen v. Rowley	64, 74, 91, 96
Vandewalker v. Osmer	631
Van Dyke v. Van Dyke	694
Van Wyck v. Seward	107
Vassar v. Camp	209, 210
Vaughan, The	583
v. Webster	703, 707, 712
Vawter v. Griffin	477, 479
Veal v. Veal	157, 182
Veazie v. Somerby	411
v. Williams	665, 667
Ventress v. Smith	22, 23
Verdin v. Robertson	213
Vermilye v. Adams Express Co.	23
Vernede v. Weber	317
Vernon v. Keys	640
Vertue v. Jewell	588, 599
Vickers v. Vickers	200, 282
Vincent v. Germond	449, 450, 504
v. Leland	337, 339, 611
Vinton v. Peck	653
Voorhees v. Earl	632, 633
Vyse v. Wakefield	289, 290

W.

Wabash Elevator Co. v. First Nat.	
Bank	229, 292
Waddell v. Wolfe	662
Waddington v. Bristow	471
v. Oliver	405, 406
Wain v. Warlters	444, 521, 522
Wainman v. Kynman	691
Wait v. Baker	249, 268, 269, 270, 412
v. Green	298
Waite v. Jones	646
Wake v. Harrop	625
Walden v. Dixon	119, 120, 148
Waldo v. Belcher	245
Waldron v. Chase	242, 246
v. Komaine	413

Walker, <i>Ex parte</i>	595
v. Hoisington	349, 352, 612
v. Nussey	508, 510
Wallace v. Breeds	245
v. Parker	699
Waller v. Tate	680
Walsh v. Sexton	161, 164, 184
v. Studdart	172
Walter v. Hodge	174
Wanamaker v. Yerkes	254, 307
Wanamaker v. Van Buskirk	687
Ward v. Morrison	679
v. Turner	125, 152, 153, 154,
	158, 168, 181
v. Shaw	199, 235
v. Smith	432
v. Taylor	268
Warden v. Jones	104
v. Marshall	401
Warfield v. Booth	650
Waring v. Edmonds	137
v. Waring	157
Warlow v. Harrison	658, 663, 668
Warner v. Cushman	45
v. Martin	439
v. Wilson	684
Warren v. Buckminster	245
v. Copelin	679
v. Jones	650
v. Kirk	315
v. Milliken	44
v. Wheeler	291
Warwick v. Bruce	467
Washburn v. Burrows	472, 473
v. Cuddihy	352
Wason v. Rowe	341, 348
Waterman v. Gibson	696
v. Meigs	460
Watkins v. Eames	69
v. Harwood	687
v. Roberts	700, 707
v. Robb	429
Watrous v. Blair	643
Watson v. Spratley	477
v. Walker	289
Watts v. Friend	463, 468, 481, 492
v. Hendry	246
Weaver v. Beard	685
Webb v. Fairmaner	403
v. Odell	324, 621
Webber v. Davis	230
v. Minor	408
Webster v. Power	47
Weddigen v. Boston, &c. Fabric	
Co.	435
Weed v. Jewett	677
Weil v. Silverstone	46
Weimer v. Clement	336, 354, 355,
	356, 634
Weisiger v. Chisholm	105
Weich v. Mandeville	674, 675
v. Moffat	238, 441

Weld v. Cutler	246	Williams v. Banks	111
v. Lancaster	649	v. Burgess	463, 492
Wellington v. Kerosene Oil Co.	635	v. Carpenter	427
Wells v. Foster	649	v. Dixon	19
v. Tucker	157	v. Evans	439, 669
Welsh v. Bell	582	v. Fitch	167
Wentworth v. Day	16	v. Healey	291
v. McDuffie	709	v. Jackman	262
v. Outhwaite	596	v. Jones	693
Westcott v. Rims	612	v. Millington	658, 670
Westerlo v. De Witt	137, 153, 158, 159, 174, 180	v. Poor	656
Western Bank v. Addie	633, 635	v. Reynolds	603
Western Transportation Co. v. Marshall	301	v. Spafford	371
Westfall v. Peacock	552	v. Tucker	513
Weston v. Hight	149, 177	Williamson v. Allison	612, 633
Westrop v. Solomon	323, 621	v. Berry	186, 195
Westzinthus, <i>In re</i>	598	v. Connaday	329
Wetherbee v. Green	33, 36, 37, 48	v. Russell	638
Wheat v. Cross	209, 622, 624	Willoughby v. Moulton	633
Wheatley v. Abbott	71	Wilmot v. Heard	338
v. Harris	19	Wilmshurst v. Bowker	268
v. Patrick	708	Wilson v. Brett	701
Wheeler v. Knaggs	430	v. Buchanan	108
Whitcomb v. Whitney	230, 242	v. Carpenter	74, 76
White v. Bascom	702	v. Cooper	44
v. Buss	643, 645	v. Lancashire, &c. R. R. Co.	600
v. Foster	473	v. Wagar	218, 406, 552
v. Franklin Bank	644	v. Wilson	219
v. Sawyer	636	Winburn v. Cochran	693
v. Welsh	559, 562	Winfield v. Hudson	674
v. Wilks	245, 247	Wing v. Clark	256
Whitehead v. Anderson	592, 593, 595	v. Merchant	71, 76, 80
Whitehouse v. Frost	245, 247	Winpenny v. French	649
White Mountain Bank v. West	47	Winslow v. Norton	598
Whitfield v. Whitfield	117	Winsor v. Lombard	345, 358
Whiting v. Barrett	66, 87	Winter v. Winter	71, 72
Whitlock v. West	19	Wise v. Chase	435
Whitmore v. South Boston Iron Co.	332, 342, 615	Wiseman v. Vandeputt	586
Whitney v. Eaton	292, 295, 302, 303, 433	Witherby v. Sleeper	312
v. Heywood	390	Withers v. Lyss	233
v. Lee	698, 700	v. Reynolds	291, 296, 307
v. Taylor	349	v. Weaver	118, 119
Whittaker v. Johnson	681	Witt v. Amis	137, 159
Whittemore v. Gibbs	477, 479	Wittkowsky v. Wasson	199, 236
v. Whittemore	662	Wofford v. Police	18
Whittier v. Dana	528	Wolcott v. Mount	320, 321, 359, 361, 602, 617
Whittle v. Skinner	681	Wolf v. Esteb	119
Wieler v. Schilizzi	362	Wolfe v. Tyler	674
Wiggin v. Day	638	Wood v. Bell	262, 263
Wiggins v. McDonald	675	v. Hitchcock	431
Wigle v. Wigle	178	v. Jones	588
Wilbur v. How	666	v. Manley	401, 409
Wilkins v. Bromhead	250, 260	v. McClure	706
Wilkinson v. Evans	515, 517, 525, 526	v. Tassell	401
v. Verity	703	v. Yeatman	592, 597
Willard v. Stevens	348	Woodbury v. Robbins	352
Williams v. Bacon	523, 534, 535	Woodley v. Coventry	247, 567, 568, 570
		Woodman v. Nottingham	702, 710
		Woods v. Russell	248, 262, 263

Woodward <i>v.</i> City of Boston	665		
<i>v.</i> Cutter	708		
<i>v.</i> Libby	617		
Woolston's Appeal	108		
Wooton <i>v.</i> Hinkle	666		
Worcester <i>v.</i> Eaton	644		
Worman <i>v.</i> Kramer	300		
Worth <i>v.</i> Northam	38		
Worthen <i>v.</i> Wilmot	601		
Worthington <i>v.</i> Bullett	109		
Worthy <i>v.</i> Cole	308		
Wright <i>v.</i> Barnes	405		
<i>v.</i> Dannah	536		
<i>v.</i> Melville	711		
<i>v.</i> Percival	493		
<i>v.</i> Vanderplank	65		
<i>v.</i> Vaughn	411		
<i>v.</i> Wright	188		
Wyndham <i>v.</i> Chetwynd	444		
		Y.	
		Yenni <i>v.</i> McNamee	583
		Yosti <i>v.</i> Laughran	65
		Youghiogheny Iron Co. <i>v.</i> Smith	608, 610
		Young <i>v.</i> Blaisdell	504
		<i>v.</i> Cole	323
		<i>v.</i> Matthews	248, 263, 264
		<i>v.</i> Miles	43, 44
		Yourt <i>v.</i> Hopkins	657
		Z.	
		Zagury <i>v.</i> Furnell	233
		Zimmerman <i>v.</i> Streeper	164
		Züchtmann <i>v.</i> Roberts	304

THE LAW OF PERSONAL PROPERTY.

PART IV.

TITLE TO PERSONAL PROPERTY BY ORIGINAL ACQUISITION.

CHAPTER I.

TITLE IN GENERAL ; OCCUPANCY.

I. IN our former volume, after some general observations on the law of Property, by way of introduction, we first considered the nature and general incidents of Personal Property, and next proceeded to set forth, in order, the leading classes of Chattels Personal which are recognized in English and American law at the present day, whether such chattels are to be called corporeal or incorporeal ; whether, in other words, they are, like ships, objects of the bodily senses, or have a mental existence only ; in which latter case, as we took occasion to show, the chattel characteristic is essentially that of a valuable money right on behalf of the creditor, and a money debt as correspondingly viewed by the debtor, — this right or debt being sometimes naked and simple, and sometimes established by the additional security of a lien, pledge, or mortgage ; in some instances resting for proof upon word of mouth alone, but in others evidenced by writing, by a written instrument, it may be, of such recognized form and character as to float the debt into some one of those specially

privileged classes of personal chattels known as negotiable paper.

We are now to view the law of Personal Property from still another and a final standpoint, — that of Title. Title is the true foundation of ownership ; and the right of ownership may be defined as that right by which a thing belongs to one person, or set of persons, to the exclusion of all others. If there be any obscurity in the legal significance of “ Title,” it is because men apply the word somewhat indiscriminately to the means of establishing a right of ownership, and again to the right itself ; in which latter sense alone, and as synonymous with the right of ownership, we mean here to apply it. Title to real property is now evinced by instruments in writing ; and it has long been our universal rule, founded in English legislation, that you can show no transfer of an estate in land by word of mouth : whereas the great criterion of title to personal property is, and always has been, possession ; transfers of chattels, especially of corporeal chattels, being most frequently effected by mere delivery, without the aid of formal conveyances or the sanction of a public registry. We shall indeed have occasion to observe, as we go on, that possession is not an absolute and unerring test of title to personal property ; that there is in chattel jurisprudence a Statute of Frauds of partial application, just as there has been a Statute of Frauds which took away altogether the right of real-estate transfers by parol ; that with the modern development of incorporeal chattel law has grown up a system of transfers by indorsement and assignment with peculiar formalities ; that, even as to corporeal chattels, there is a possession wrongfully acquired or kept, which is inconsistent with the genuine right of ownership. And yet, as a general proposition, it is true, that he who has a chattel in his own possession and keeping holds it by a title not likely to be disputed, and needs only to deliver it with suitable intention in order to confer upon another the exclusive right of an owner.

But title to property, like any other right, becomes at times a matter of dispute between individuals; and that presumptive evidence of ownership which the possession of a chattel should furnish as against the world will not equally avail to defeat the claim of one out of possession who can show that the chattel belongs to him of right, and not to the possessor. For a title may be, in common parlance, good, bad, or doubtful. A thief may have possession of goods; but a thief has no title. Possession, too, may have been given by a man in fraud of his creditors, or of other parties having prior rights to the person who took the goods from his hands; in which case they may recover the goods, though he cannot. There should be then, in one who acquires personal property, besides possession, the right of possession, to make the title a good one. But one may hold possession of goods merely in trust, or by way of bailment; and, if so, he is a rightful possessor, but no owner, notwithstanding the law frequently deems his title sufficient for maintaining an action against strangers who would injure the goods, or deprive him of possession. Besides possession and the right of possession, then, there should be likewise the right of property. It is only where possession, the right of possession, and the right of property, meet in one and the same person, that title to the particular chattel stands complete, and an individual's right of ownership indisputable. Any title short of this, if effectual at all, is effectual only under certain phases, either as against certain parties, or for certain purposes. And yet, since possession must, in the nature of things, be essential to an exclusive and proper enjoyment of the chattel, and he who is out of possession with the bare right of property must usually bring an action, overcome presumptions by proof, and establish his own right, it follows, that, with possession alone to start with, one may frequently become in time the clear owner. His title ripens and becomes full, not as indisputable, but because undisputed: lapse of time bars out all suitors; and at last his

exclusive right to enjoy and transmit no one can deny, for no one can set up a better title. All this because he first took possession, and then kept it.

Title to personal property may accrue in three ways: (1) by original acquisition, (2) by a transfer by some act of law, (3) by a transfer by some act of the parties; which last two classes might be embraced under the single head of Derivative Acquisition. And as title reaches down through a chain, so to speak, commensurate in length, if complete, with the chattel's period of actual existence, the first link of the chain, or, supposing a break, of the chain recommenced whose connecting link is gone, stands for title by original acquisition; while each successive link represents a transfer, either by act of law or by act of the parties. Two modes of transfer, again, are contemplated by jurists both of the civil and common law, — transfer as between living parties, and transfer as effected on the death of a party; in neither of which cases would the law willingly suffer the old chain to fail for want of a succeeding link. Thus, then, may the general course of the present volume be mapped out. But as we have already treated both of legacies and distributive shares at length,¹ nothing more need be said on the subject of transfer as effected on the death of a party, unless it be to remind the reader that personal property passes in the one instance by the deceased party's own transfer, supplemented by an act of law which gives it full operation, while in the other the transfer operates entirely by act of law; and further to add, that the gifts *causa mortis*, to be described hereafter, are taken by a title in many respects quite similar to legacies. Nor need we, like Blackstone, dwell, as we proceed, upon such topics as Corporate Succession, Marriage, Judgment, and Bankruptcy;² for though, in a certain aspect, these subjects and some others present themselves fairly under the

¹ See 1 Schouler Pers. Prop. 728-750.

² See 2 Bl. Com. 400. And see also 2 Kent Com. Lec. 37.

title of property transfer by act of law, their treatment may well be omitted in a work on personal property which aims to be practical, and to keep within due bounds. Let us confine ourselves strictly then, in this book, to Title by Original Acquisition, Title by Gift, and Title by Sale: for except it be through another's death, as just suggested, one seldom could become the owner of a specific chattel unless it was sold to him, or given to him, or he stood entitled by original acquisition; while, in one or another of these three ways, the ownership of a chattel constantly arises. These subjects will be taken up and considered in order.

II. For this chapter, and those next succeeding, the subject is *Title by Original Acquisition*; that is to say, title where the owner takes the chattel without succeeding to the title of any former proprietor.¹ The chain illustration may still remind us that such a title may either begin at the original beginning, or after some break at which ownership lost its hold; in other words, that the owner's right by original acquisition is not always a right commencing at the creation of the identical chattel, but may likewise date from any subsequent period where the chattel has come to him under such circumstances that the law is unable to identify any party from whom he could have derived it. Under the head of Original Acquisition are to be specially considered Occupancy, and the Title to Products.

Occupancy is a term which properly denotes the taking possession of, with intent to appropriate, that which at the time has no owner, and yet had specifically an earlier existence. This sort of title is applicable to corporeal property generally; to lands, with more comprehensiveness than to chattels; in a word, to the things which are found anywhere belonging to nobody. The Roman law recognized such a class under the

¹ 2 Kent Com. 355; Bouvier Dict. "Acquisition."

head of *res nullius*: comprehending, first, things which never had an owner, such as wild animals, fishes, wild fowl, jewels disinterred, and newly-discovered lands; and, next, things which have not now an owner, as movables which have been abandoned, lands which have been deserted, and (by a stretch of analogy) the property of an enemy. In all such cases, whoever first took possession with the intent, as manifested by his acts, of keeping the property as his own was to be regarded the owner; and this principle underlies all the modern law of occupancy.

Title by occupancy, as applying to a primitive state of society, has doubtless afforded law-writers, ancient and modern, a wider field for speculation than the collating of decisions. Why the right of exclusive ownership should be considered a natural right, given man at the beginning for wise purposes, and not, as some would have us believe, man's own invention at an advanced stage of society, the product of civilization, we took occasion to show at the outset of this work.¹ However much jurists may differ as to the origin of property rights, they are nevertheless quite harmonious in ascribing to occupancy, or the taking possession of a thing, the first foundation of that ownership, which, in modern ages, is thought to be nothing if not exclusive. But occupancy alone must have conferred a weak title: length of time, to say the least, would be requisite to perfect it. On occupancy, then, followed by a continuous exclusion of others, the primitive right of ownership has been grounded by most writers on the subject. Savigny, expounding the Roman law, thus clearly epitomizes it: All property is founded on adverse possession ripened by prescription; a position which differs not essentially from that taken by common-law writers like Blackstone.

A learned and acute English writer of our day, however, expresses his dissatisfaction with the conclusions drawn by

¹ See 1 Schouler Pers. Prop., Introductory Chapter.

these authorities, and indeed with the impression which has prevailed hitherto concerning the part played by occupancy in the early stages of society. It is not wonderful, he observes, that property began in adverse possession; that the first proprietor should have been the strong man armed, who kept his goods in peace: for the mystery resides, not in the mode of assuming exclusive enjoyment, but in showing why it was that lapse of time should have created a sentiment of respect for his possession. And the result of his own reasoning is, that an occupant becomes the owner simply because all things are presumed to be somebody's property, and because no one can be pointed out as having a better right than he to the proprietorship of this particular thing.¹

Discussion might fairly be dropped here, with the remark, that occupancy, or adverse possession, being admitted on all hands to be the primitive legal mode of acquiring ownership in an existing thing, lawyers might well leave questions of sentiment concerning title to the metaphysicians. But, with the reader's permission, we call attention to still another element in the case, which all of these jurists seem to have overlooked; namely, that of labor and pains bestowed by the first occupant as further strengthening the title he acquired by taking possession. This is an element of ownership which one may trace in legislation on matters of original acquisition. Thus, under the present laws of the United States, which deal with the waste and unoccupied public lands, a settler acquires title, not by merely squatting on the lands, but by bestowing a certain amount of work in improving the premises, besides occupying them for a fixed time. As the reward of labor, following upon occupation of the soil, government gives him the right of pre-emption therein, or donates the land to him outright. And again, to revert to personal property, authors and inventors are specially pro-

¹ Maine Ancient Law, 4th ed. c. 8, pp. 256, 257, commenting upon Blackstone, Savigny, and others.

tected by law in the enjoyment of their valuable brain productions, because the sentiment is universal that every man ought to take the fruits of his own labor. We may say, then, that the primitive title to property, which, as jurists agree, is founded in occupancy, ripens and inspires the respect of society through length of time and the bestowal of labor. For, let it be remembered, scarcely any thing worthy the name of property is to be found in a primitive stage of society: the soil must be cleared and cultivated; minerals must be dug up; wild animals must be chased and caught; useful implements must be skilfully fashioned from materials gathered with care; even a valuable article, already prepared and ready for use, requires one's pains to keep it from spoiling; in fine, occupancy and labor must everywhere conjoin, or else exclusive enjoyment becomes a physical impossibility.

So much, then, for primitive occupancy. It is plain, that, in a polished age like ours, title by occupancy to personal property can seldom occur save where something turns up without a known owner capable of conferring title. The former owner has most likely abandoned or lost it, or some one has stolen it from him. Possibly he lives, and is unaware of his title; or has died, leaving no one to come forward and claim the property by transmission. To say that the thing was designedly abandoned would rarely be less than a violent assumption: men may give what they deem valuable for a designated object, and to persons of their own choice; but they are not foolish enough to throw it upon the public. Yet instances of strict abandonment are doubtless to be found, especially where a product is deemed valueless by the owner who throws it away, while to a finder it is valuable. Thus, manure belongs originally to the owner of an animal; but, by leaving the manure in the road where it was dropped, he is presumed to have abandoned it; in which case the first

taker has a right to appropriate the chattel to himself.¹ A similar rule would apply to old clothing, junk, ashes, slops, and the like, which the owner casts aside as worthless: for any thing which one throws away, or leaves in such manner as to warrant an inference that he means to make no further claim thereto, comes under the rule of derelict or abandoned property, which may be appropriated by the first taker;² subject of course, in each case, to such paramount title, if any, as local legislation may have given the state or municipality.

Waifs are stolen goods waived or scattered by a thief in his flight in order to facilitate his escape. The common law, according to Blackstone, made such things the property of the king, whenever taken on his behalf; any private finder in this case being disregarded, and even the plundered owner himself being powerless at law to procure restitution, on the fanciful theory that he could not have chased the thief with sufficient zeal if the officer got the property before him. No such absurd and unjust rule has ever been adopted in the United States; even in England, it is set out with much reservation: and as no title can be conferred by a thief, running or standing, the true policy would seem to be that now quite generally recognized; namely, to make the State acquire title substantially in trust for the true owner, who may regain the property on duly establishing his rights.³

All such derelict as we have described are of chattels inanimate found on the earth's surface. Where chattels of value are found in the earth, under circumstances which indicate that they were at some former period concealed or deposited there by an owner now unknown, they are styled *treasure-*

¹ *Haslem v. Lockwood*, 37 Conn. 500. Though it is possible the town might have a right as against the taker. *Ib.*

² *Bouvier Dict.* "Derelict;" 2 Kent Com. 357. As to property in the hands of an officer, under judicial process, see *Norton v. Nye*, 56 Me. 211.

³ 1 Bl. Com. 296, 297; 2 Kent Com. 358; Cro. Eliz. 694. Even the common law asserts the king's right with numerous reservations.

trove; and the term applies in general to money, bullion, valuable plate, and works of art, found hidden in any private place. The fact of burying or concealing indicates rather the desire to keep safely than to part possession; and hence if the owner, whose secret was presumably lost, can be found, the property must be restored to him. But where no owner can be found, as generally happens, the property vests, according to the late English law, in the king. In most of the United States, the legislature has vested treasure-trove in the State as *bona vacantia*. But the civil law, to a large extent, favored the owner of the soil, wherever hidden treasure was found; also the casual finder in another person's lands.¹ Such, too, appears to have been the early rule of the common law; but it is now a criminal offence in England for an individual finder to appropriate such property to himself, while concealing his discovery from the government.²

A sort of constructive abandonment — or, as it might rather be termed, of forced abandonment — arises in the case of a wreck. By wreck, we popularly denote the destruction of a ship or vessel on the shore; and the maritime law, under this head, comprehends goods, and fragments of the shattered vessel, which are cast upon the land by the sea, and left so as to belong to the jurisdiction, not of admiralty, but of common law. Goods, to be wreck, should be found at low water, between high and low water mark; though whether resting wholly on the shore, or partially moved by the water, matters not.

Wrecked goods were anciently adjudged to belong to the king; not, on the usual principle of derelict, to the first finder, lest bands of wreckers — those pests of a community — should be too greatly incited to plunder; nor even to the

¹ 1 Bl. Com. 295, 296; 2 Kent Com. 358; Bouvier Dict. "Treasure-Trove;" Grot. de Jure Bell. et Pac. b. 2, c. 8, § 7.

² Reg. v. Thomas, 12 W. R. 108. See also 2 Bish. Crim. Law, 5th ed. §§ 875, 876.

original owner, because it was said that all title had passed out of him when the ship went down. This sovereign right was usually delegated, by way of a perquisite, to the lord of the manor. But thus to apply the law of derelict was felt to be harsh indeed towards the owner; it was adding sorrow to sorrow: and hence was enacted the statute of Edward I., giving to the owner of wrecked property a year and a day in which to make his claim; and further providing, as the commentaries ran, that if a man, or a dog, or a cat, escaped alive to shore, the vessel should not be deemed a wreck.¹ Out of this latter quaint expression grew a curious controversy, in which the sensible and humane finally prevailed over the more precise construction of the statute; for it was decided in a case before Lord Mansfield about a century ago, upon full argument, that the dog and cat of the old law were used merely by way of illustration, and not in a literal sense; that the true intent of the act was to save the goods to the owner, provided something remained to identify the property as his; whether it were a live animal or a dead one, or any distinguishing mark. The whole inquiry, therefore, conformably to this decision, resolves itself into a question of ownership; and, under this statute (which is old enough to be deemed part of the common law of our country as well as of England), the goods go to the original owner if their identity can be established. A year and a day is the period allowed for the owner of wrecked goods to make his claim known; and, where the goods are of a perishable nature, they are sold, and the proceeds are retained subject to the same rule of final disposition.²

Ships or vessels, and their merchandise, found constructively derelict or abandoned at sea, are not, it is perceived, within the strict definition of wreck, though apparently once

¹ Stat. Westm. 3 Edw. I. c. 4, amending earlier statutes; *Hamilton v. Davis*, 5 Burr. 2732.

² 1 Bl. Com. 291, 292; *Hamilton v. Davis*, 5 Burr. 2732; Bract. lib. 3, c. 3; 2 Kent Com. 323. See *Dunwich v. Perry*, 1 B. & Ad. 831.

regarded as a sovereign perquisite of a similar sort. Later English statutes require the proceeds of such property, when sold, to be placed in the national exchequer, subject there to be claimed by the true owner within a year and a day.¹ So that the same generous policy now prevails, whether the admiralty or common-law courts take jurisdiction.

Since admiralty jurisdiction belongs to the United States, and that at common law over the sea-shore to the several States, our American law of wreck and derelict at sea must necessarily be of limited application, whether on State or Federal side. But appropriate legislation has done much to insure uniformity, and to secure justice to the true owner under whatever circumstances. It would appear that the proceeds of derelict property found at sea, for which no claimant appears, vest in the United States, subject to the payment of salvage.² As to property thrown upon the coasts, or found in inland waters, the law of the particular State applies; the general policy of American legislation being, however, to keep the property or its proceeds for a year, subject to redemption by the owner; and, if not claimed within that period, to put the proceeds into the public treasury; usually regarding the casual finder only to the extent of paying all expenses, and perhaps allowing him something by way of salvage besides. Commissioners are appointed to take custody of shipwrecked goods, and preserve them on behalf of the State, subject to the owner's claims within the specified period; and penalties are imposed upon all private persons who intermeddle with such property with the object of appropriating it to themselves.³

¹ Acts 17 & 18 Vict. c. 104; 25 & 26 Vict. c. 63; 1 Sch. Pers. Prop. 426; *Palmer v. Rouse*, 3 H. & N. 505.

² *Peabody v. Bags of Cotton*, 2 Am. Jur. 119; 2 Kent Com. 359; *Chase v. Corcoran*, 106 Mass. 286.

³ See 2 Kent Com. 359, with reference to local statutes, in notes; *Chase v. Corcoran*, 106 Mass. 286; Mass. Gen. Sts. c. 81. As to salvage generally, see 1 Sch. Pers. Prop. 423-428.

In construing all such statutes, the courts are careful not only to distinguish between ships and goods cast upon the shore by the sea and those found afloat without an apparent owner, but even in the latter class of cases to discriminate according as circumstances may indicate that the property was or was not actually adrift because of some marine disaster. Thus timber found floating loose not far from land may have merely slipped from its proper fastenings; and so it may frequently be with a stray boat. Some statutes are enacted with special provision for floating timber; and, in general, the burdensome formalities attending wreck legislation are not to be pursued where apparently there has been no marine disaster. Especially is this true of salvage compensation; though doubtless the owner of the rescued property ought at least to make the finder whole for all expenses incidental to its preservation while in the latter's keeping.¹ Whether marine products like seaweed, cast upon the shore, between high and low water mark, may be taken by the first finder, on the general principle of occupancy, is a question on which authorities differ: for the reason, that by the rule of some States, like Massachusetts, the rights of the owner of adjoining soil are deemed to extend to low-water mark; while in others, like Connecticut, they are limited at high-water. Where the former rule applies, the proprietorship of the soil would appear to confer a title, even as to wrecks, only secondary to the paramount claims of the State and the original owner, and quite sufficient for dispossessing any intruder upon the shore who claims to have been the first finder.²

¹ Scott v. Willson, 3 N. H. 321; Barron v. Davis, 4 N. H. 338; Palmer v. Rouse, 3 Hurl. & N. 505; Baker v. Hoag, 3 Seld. 555; Chase v. Corcoran, 106 Mass. 286, and authorities cited.

² Mather v. Chapman, 40 Conn. 382, *passim*; *contra*, Barker v. Bates, 13 Pick. 255. And see Reg. v. Clinton, Ir. Law Rep. 4 C. L. 6, 15, cited 2 Bish. Crim. Law, § 877.

As to lost chattels, the general rule is drawn, like that of goods strictly abandoned, from the broad principle of occupancy: and here the first finder will acquire title to the thing by taking possession; his right of ownership, however, being less substantial than in the instance of derelict, inasmuch as there still remains a paramount claimant; namely, the loser, who may recover the property on presenting himself and establishing his right. The finder of lost property, then, has, at the common law, a valid title thereto against all the world except the true owner.¹ Nor is lost property the subject of larceny, while the finder remains in ignorance of the former owner.²

The leading English case on the finder's title to lost goods is *Bridges v. Hawkesworth*.³ A commercial traveller called at a shop on business; and, as he was leaving, saw a small parcel lying on the floor, which he picked up, and showed to the shopman. Opening the parcel in the shopman's presence, he found it contained a considerable sum of money. He now called one of the firm, and placed the money in his hands for the purpose of having the property duly advertised for an owner. This was done; but the advertisement remained unanswered. No owner appeared; and, after three years had elapsed, the commercial traveller asked the firm to return the property to him, offering at the same time to pay all expenses, and furnish indemnity; but the firm refused to do so. Upon this state of facts a suit was brought. It was clear, that, had the parcel been found outside of the shop, the finder's right would have accrued; nor did the circumstances show a waiver of such right. But the single point at issue, and a novel one at

¹ *Bridges v. Hawkesworth*, 7 E. L. & Eq. 424; 15 Jur. 1079; 2 Kent Com. 356; *McAvoy v. Medina*, 11 Allen, 548.

² *Lawrence v. State*, 1 Humph. 228; *Queen v. Glyde*, L. R. 1 C. C. 739. And see *infra*.

³ 7 E. L. & Eq. 424; 15 Jur. 1079 (Q. B. 1851). And see *Merry v. Green*, 7 M. & W. 623.

common law, was, whether the circumstance of finding the property in their shop gave the firm any right as against the finder. The court decided that it did not, and applied to the case the general rule of occupancy ; giving the property to the finder exclusively. We may not from this case, however, safely infer that the local situation of the property is always to be disregarded ; for there is a later Massachusetts case, which decides that where a transient customer accidentally leaves his pocket-book on the table at a barber's shop, and another customer sees it, and hands it to the barber to be advertised and kept for the true owner, the barber's title is paramount to that of this latter customer.¹ Merely to see a thing which the owner has casually laid down, and forgot to take away, — both parties being customers in the place where it is left, — does not appear to be so positive a case of occupancy as to entitle one to the rights of a finder.²

How far the loser's own title may be put at jeopardy by subsequent transfers of the found chattel will be presently noticed.³ As to the finder, there are certain duties and rights resulting from the discovery. He should not only take suitable care of the property if he assumes to be the lawful finder at all, but should make reasonable efforts to ascertain the true owner : all this according to the special circumstances of the case, and with due reference to the value and perishability of the chattel. Advertising is usually resorted to ; and, as the loser will probably advertise likewise in a matter of value, the finder can hardly be justified in turning from traces of ownership which are placed before his eyes. It follows that the finder is always entitled to suitable recompense for the expense and labor to which he may have been put in preserving the chattel and ascertaining the former owner ; in

¹ *McAvoy v. Medina*, 11 Allen, 548 ; *Lawrence v. State*, 1 Humph. 228.

² See *Kincaid v. Eaton*, 98 Mass. 139 ; *Merry v. Green*, 7 M. & W. 623.

³ See, as to market-overt, &c., *infra*.

other words, to full indemnity. And, besides, if the loser offer a reward for its restoration, the finder, upon giving it up, has the right to demand payment of the same; but as questions of this kind, so far as lost property on land is concerned, are determined upon the principles of contract, and not salvage, — in which respect we follow the Roman law, — the finder, who once accepts in satisfaction less than the advertised reward, cannot afterwards claim the full amount offered by the loser, even though he had deserved it.¹ Until a perfect title has accrued to the finder through lapse of time and the non-appearance of the true owner, his right of possession is to be deemed rather in trust than by way of ownership; a title sufficient, nevertheless, to enable him to maintain trover against all third parties.²

Legislation has, here as elsewhere, sought lately to narrow the rights of the individual occupant, by making the State or local municipality a paramount owner, and at the same time taking such initial steps as may the better enable the true owner to trace out and recover his property. Under the policy of Massachusetts and some other States, the first finder seems to be treated somewhat as a salvor, though perhaps not quite so favorably; and, next to the loser, the public steps in as the paramount party entitled to the benefit of a discovery of lost chattels. The practical enforcement of such legislation must needs be difficult; in small things, and with reference to society at large, almost impossible; since the finder, secure in what he deems a natural right, will risk threatened penalties in the hope of personal advantage: yet where, in the case of valuable goods, the machinery can work without grinding to pieces, there is much to commend a rule whose theory is to

¹ 2 Kent Com. 356, 357; *Nicholson v. Chapman*, 2 H. Bl. 254; *Wentworth v. Day*, 3 Met. 352; *Marvin v. Treat*, 37 Conn. 96. As to the finder's lien for compensation, see 1 Sch. Pers. Prop. 488.

² 2 Kent, 356; *Bridges v. Hawkesworth*, 7 E. L. & Eq. 424; 15 Jur. 1079.

substitute for individual aggrandizement the equal welfare of all.¹

Now that valuable chattels of the incorporeal sort abound, written instruments have become important muniments of title. Let us apply to these the doctrine of lost and found. If a writing be lost or destroyed, the cause of action is not thereby extinguished; for the general principle is, that the party who seeks to recover upon it must first prove the loss affirmatively by direct or indirect testimony, according to the circumstances; after which he may furnish secondary proof of its contents. This is the only prerequisite to a full recovery, unless the writing were of a negotiable character.² But this difficulty presents itself in the case of lost negotiable instruments, like bills, notes, and coupon bonds, — that the party liable for payment thereof has undertaken to pay according to its tenor any one who may present the instrument properly indorsed to himself, or occupies the mercantile standing of “bearer;” and hence should require the instrument to be delivered up to him for his suitable protection. Hence the law courts laid down the rule, that the party liable on negotiable paper could be sued if the writing were proved to be utterly destroyed, or lost while requiring some indorsement to give it negotiability, or even if lost when overdue; in other words, whenever the instrument was not in the negotiable condition at the time the rightful owner had parted possession; for here the party liable on the instrument incurred no risk; but otherwise the loss constituted a good defence. This principle of defence was applied to bank-notes, bills, promissory notes, coupon bonds, and the like; indeed, wherever any finder might give the instrument new circulation, and render the debtor liable a second time. But since the law here failed

¹ See 2 Kent Com. 356 n.; Mass. Gen. Stats. c. 79; *Jones v. Smyth*, 18 N. H. 119.

² *Clark v. Hornbeck*, 2 C. E. Green, 430; *Hoereth v. Franklin Mill Co.*, 30 Ill. 151; *Swift v. Stevens*, 8 Conn. 431; 1 Greenl. Evid. § 558.

to do full justice between the parties, equity came in with a remedy well adapted to the emergency. Its rule was, that the party justly entitled to the instrument, who was unable either to produce it, or show that when he parted possession it was unavailable for title to others, should give a bond of indemnity to the debtor party, and thereupon might recover what was due. This has at length become the prevailing doctrine of England and America; our modern practice so blending equity and common-law functions as to enable the ordinary tribunals in most instances to afford a remedy of the same sort.¹ Manifestly, however, no negotiable instrument, lost or not lost, is to be sued upon before the maturity of the debt which it represents; ² and, if a bond of indemnity from the loser will suffice to enable him to recover on the lost instrument in any case, it is simply because this gives adequate protection to the party liable, since the indemnity requisite is always assumed to be that which properly covers the whole ground.³

An estray is any domestic animal whose owner is unknown. Estrays at English law belonged to the lord of the soil within whose domains they happened to be found; but proclamation in the adjoining towns was usually required, and the former owner had a year and a day allowed him to reclaim the property as his own. In most if not all of the United States, there are statutes concerning estrays and animals generally which are found running at large; the common practice being

¹ *Clay v. Crowe*, 8 Ex. 295; *Tuttle v. Standish*, 4 Allen, 387; *Des Arts v. Leggett*, 16 N. Y. 582; 2 Pars. Bills & Notes, 260-263; 1 Sch. Pers. Prop. 592, 593; *Hough v. Barton*, 20 Vt. 455; *Wofford v. Police*, 44 Miss. 579; *Hill v. Barney*, 18 N. H. 607; *McMillan v. Bethold*, 35 Ill. 250; *Elliott v. Woodward*, 18 Ind. 183; *Fells Point Savings Institution v. Weedon*, 18 Md. 320; *Perkins v. Cushman*, 44 Me. 484; *Bank of Mobile v. Meagher*, 33 Ala. 622; *Story Eq. Jur.* §§ 81, 82. And see, as to a lost insurance policy, *England v. Lord Tredegar*, L. R. 1 Eq. 344.

² *Clay v. Crowe*, *supra*, per Parke, B.

³ *Tuttle v. Standish*, *supra*; *Bond v. Whitfield*, 32 Geo. 215; *Savannah Nat. Bank v. Haskins*, 101 Mass. 370.

for the city or town authorities to impound the animals, subject to the true owner's reasonable claim; and if no owner appears to claim and pay expenses, to dispose of them finally for the benefit of the public.¹ Tame animals found at large are doubtless sometimes of the derelict sort, — unusual labor and expense being involved in the keeping of this class of chattels, — but have more commonly strayed from the true owner. The public health and safety furnish reasons for other statutes and ordinances relating to stray animals, such as permitting unlicensed dogs to be killed, trespassing animals to be impounded by the finder, and the like.² But as all such legislation is in derogation of private rights, every act of this sort is to be strictly construed; in the owner's favor if possible, and against those who would wantonly deprive him of his property; but always with due regard for the ancient maxim, that one should so use what belongs to himself as not to injure others.³ Wild animals, whose ownership has already formed a topic for investigation, furnish the only distinct class of chattels which could possibly have been made the subject of primitive occupancy.⁴ Even here, notwith-

¹ *Strauser v. Kosier*, 58 Penn. St. 496; *State v. Harvey*, 28 Tex. 632; *Newsom v. Hart*, 14 Mich. 233; *Boothe v. Fitzpatrick*, 36 Vt. 681; *Clark v. Lewis*, 35 Ill. 417; *Abb. U. S. Dig. 1st Series*, "Animals;" *Whitlock v. West*, 26 Conn. 406; *Rice v. Underwood*, 27 Mis. 551; *Goodwyn v. Cheveley*, 4 H. & N. 631; *Morse v. Reed*, 28 Me. 481. In some States the property goes to the finder, if not claimed. *Hudson v. Agee*, 6 Bush, 366. One who takes up an estray cannot claim reward, but only indemnity. *Amory v. Flynn*, 10 Johns. 102; *Ford v. Ford*, 3 Wis. 399.

² *Kerr v. Seaver*, 11 Allen, 151; *Carter v. Dow*, 16 Wis. 298; *Adams v. Adams*, 13 Pick. 384; *Stevens v. Curtis*, 18 Pick. 227; *Campbell v. Evans*, 45 N. Y. 356; *Blair v. Forehand*, 100 Mass. 136; *Ladue v. Branch*, 42 Vt. 574.

³ See, besides cases *supra*, 2 Kent Com. 359; 1 Bl. Com. 297; 2 ib. 14; *Ibottson v. Peat*, 3 H. & C. 644; *Drew v. Spaulding*, 45 N. H. 472; *Wheatly v. Harris*, 4 Sneed, 468; *Williams v. Dixon*, 65 N. C. 416. The estray decisions are very numerous, but not of much general importance.

⁴ 1 Sch. Pers. Prop. 77-83.

standing the universal principle of law, that all mankind may pursue and take animals, whether of the air, earth, or water, in a wild state, the first occupant becoming the owner, there is found a restraint which ownership of the soil imposes, and which fastens the closer as population grows and civilization advances.¹

The doctrine of chattels lost borders closely upon that of stolen chattels; but the standing of the taker, in the latter instance, is found essentially different in the circumstance that he has knowingly deprived the true owner of his property. The ancient laws of Europe seemed not averse to substituting the king for the thief, in all respects except punishment for the crime; for, upon the latter's conviction, the stolen goods were confiscated to the sovereign, without paying the slightest regard to the true owner's claim. But, in course of time, men grew wiser; and it is now our fundamental rule of personal property, that no man shall be deprived of his own property, without his consent.² At this day, the rightful owner, although out of possession, has a right to sell the property of which another has wrongfully deprived him, and to convey a title sufficient for the latter to set up in order to dispossess the wrong-doer.³ As against the thief or wrong-doer: furthermore, as against any subsequent person who has acquired possession with knowledge of the theft, the true owner may follow up and regain the chattel which he had never intended to part with; for since the thief himself had no legal title to be transferred, neither has one who stands upon that title, knowing it has been wrongfully acquired.

¹ See 2 Bl. Com. 403; Inst. 2, 1, 12. Statutes may affect this right of occupancy likewise. See, for instance, the game laws of England, 2 Bl. Com. 410-419, and *n.*

² *Hoffman v. Carow*, 22 Wend. 285; 2 Kent Com. 321, 323; 2 Bl. Com. 449, 450.

³ *Tome v. Dubois*, 6 Wall. 648; *Hall v. Robinson*, 2 Comst. 293; *Carpenter v. Hale*, 8 Gray, 157.

It matters not what the purchaser in bad faith may have paid for the goods: the law does not suffer the guilty partaker to profit by the thief's criminal act. Upon conviction of the thief, according to the practice commonly sanctioned by statute at the present day, the property, if in the custody of the law-officers, becomes reinvested in the owner, and is restored to him.¹ Neither reward, nor indemnity for expenses incurred, can be demanded by the wrong-doer; and to discourage the compounding of crimes—a practice to which an owner too naturally inclines, so long as the thief can keep him at arm's-length—there are frequently enactments, founded on sound policy, which make it a penal offence even to offer rewards for property stolen or lost in terms purporting that money will be paid and no questions asked, on restitution.²

Justice demands, therefore, and the law concedes, that the owner of personal property may pursue and reclaim the chattel wherever he can find and identify it. But, in his pursuit, he is sometimes met by a countervailing equity; namely, that of some holder of the chattel who has acquired it in good faith, and on payment of a valuable consideration. Here the law is in a quandary. It is difficult to apply a just rule: some innocent person must needs suffer loss. In England, the doctrine of sale in markets-overt or fairs has long been enforced to meet such cases. Sales in markets-overt are available against the original owner for the protection of an innocent purchaser, even though he bought the goods of a thief. While, in the country, there were customary days for market-overt sales, and a customary spot of ground for particular kinds of goods, thus insuring somewhat that publicity of transfer which the law contemplated as essential, the owner's

¹ *Scattergood v. Sylvester*, 15 Q. B. 506.

² *Florence Sewing-Machine Co. v. Warford*, 1 Sweeny, 433; *Lockhart v. Barnard*, 14 M. & W. 674; 24 & 25 Vict. c. 96, § 102.

chance of recovering his goods, if they were once brought into London, were very slight ; for, in that city, every shop where goods of that particular sort were professedly exposed to sale was deemed for that purpose a market-overt, and every day of the week, save Sunday, a market day. Such, for centuries, has been the English rule, beginning at a period when simple methods of corporeal transfer prevailed, and extending down into an age of mercantile transactions of the most varied and complex sort. This antiquated doctrine of markets-overt has never been recognized in the United States : on the contrary, we find it in several States expressly repudiated.¹ Even in England it has not been allowed to apply to transfers by gift or pledge, nor to sales conducted after sunset, or in closed shops, or under circumstances inconsistent with a *bona fide* purchase : in a word, the whole transaction, through delivery and payment, should be free from artifice and stealth, so that the former owner may have a full opportunity of overtaking the goods, and stopping the sale before it is too late.²

The American rule being to disregard this whole system of markets-overt, we are thrown back upon the general doctrine of the civilians of Europe, that no one can transfer a greater title than he himself has. We shield the true owner from loss ; and consequently the *bona fide* purchaser, like the dishonest receiver and the thief, must surrender the chattel to the owner, whose right to lay hold of that which was taken without his consent, wherever he can find it, is thus put upon the very strongest foundation. The purchaser, in that event, has no recourse but to the party from whom he purchased : he must rely for indemnity upon the implied or express warranty of title under which he made payment to his

¹ Ventress v. Smith, 10 Pet. 161; Hoffman v. Carow, 22 Wend. 285; Dame v. Baldwin, 8 Mass. 518; Black v. Jones, 64 N. C. 318; Dawson v. Susong, 1 Heisk. 243; 2 Kent Com. 323, 324.

² Crane v. London Dock Co., 5 B. & S. 313; 2 Inst. 713; 2 Bl. Com 449, 450; Benj. Sales, Book I., part 1, c. 2, § 1; Lee v. Bayes, 18 C. B. 599.

vendor.¹ The effect of this is salutary in discouraging dealings with irresponsible parties. An auctioneer, too, who sells stolen goods, has been made answerable to the true owner for the proceeds of the sale paid over by him to the thief, notwithstanding his own innocence of criminal intention.²

But, as concerns money, bank-notes, and current negotiable securities, the rule is well established, in the courts both of England and America, that the *bona fide* holder, who has paid a valuable consideration or furnished an equivalent, shall retain title against any former owner, — even against one from whom the chattel had been stolen. The only material questions here arising are two: (1) whether the present holder was a purchaser; (2) whether his purchase was in good faith; and the evidence is to be submitted to the jury, as in other questions of fact, for decision according to the weight of testimony. It is not enough for the owner dispossessed by loss or theft to show that the present holder had failed to make careful inquiries as to title before purchasing, and took the same imprudently; for honest intent alone becomes the vital issue wherever a valuable consideration has passed; nor are imprudence and negligence necessarily inconsistent with good faith.³ Why the equity of holders for value should be so strongly upheld in property of this description, while, as to other chattels, not permitted in our American courts to defeat the claims of any owner wrongfully dispossessed, may not clearly appear at first glance; and, indeed, the distinction

¹ *Ventress v. Smith*, and other authorities cited *supra*. See *Sales, infra*, as to the doctrine of warranty.

² *Hoffman v. Carow*, 22 Wend. 285. See also *Sharp v. Parks*, 48 Ill. 511.

³ See 1 Sch. Pers. Prop. 593, 614; *Goodman v. Simonds*, 20 How. 343; *Backhouse v. Harrison*, 5 B. & Ad. 1098; 2 Pars. Bills & Notes, 263-279; *Lowndes v. Anderson*, 13 East, 130; *Raphael v. Bank of England*, 17 C. B. 161. But as to overdue paper, see *Vermilye v. Adams Express Co.*, 21 Wall. 138. The late case of *Seybel v. Nat. Currency Bank*, 54 N. Y. 288, goes very far in sustaining the rights of a purchaser who has means of ascertaining the defect of title, but neglects to avail himself of his opportunity.

has not always been applied with perfect legal consistency. The reason is doubtless found in the circumstance, that title and the preceding holder's good credit may readily be taken into account, wherever one seeks to purchase a horse, a bale of goods, and the like, which may not often change hands; while it cannot so well in the case of commercial paper, and, still more, of money, which often change hands, and constantly circulate in the community as a medium of exchange, and for the mutual adjustment of debts and credits, on a valuation easily referred to the face of each chattel. Thus much does the law concede to mercantile convenience. It follows, then, that one liable on a lost or stolen negotiable security discharges himself by payment, in good faith, to any *bona fide* holder thereof; but as this rule will not always suffice for his protection, inasmuch as the holder's title may have been acquired in bad faith, legislation sometimes extends the debtor's indemnity to all cases of *bona fide* payment made by him upon the instrument.¹ If the debtor has received seasonable notice from the dispossessed owner before actual payment at maturity, it would appear to be unjustifiable in him to pay any party who may present the lost or stolen instrument without inquiry: his safer course, if the true ownership be in doubt, is to interplead the parties, or otherwise remit them to the courts for a final adjustment of the dispute.²

While the thief's transfer may avail to clothe a stranger with the rights of ownership to the limited extent just noticed, not only is his own title invalid, but he may be criminally indicted for larceny. Yet larceny is a crime not always

¹ See Stat. 24 & 25 Vict. c. 96, § 100; Benj. Sales, Book I., pt. 1, c. 2, § 1.

² See *McLaughlin v. Waite*, 5 Wend. 404; 2 Kent Com. 357 and *n.* The *bona fide* purchase of negotiable bonds with indorsement erased by the thief is void; and so generally with forged paper. *Colson v. Arnot*, 57 N. Y. 253.

to be defined with accuracy. For, supposing one has obtained goods under false pretences, he may yet pass them off by sale to a *bona fide* stranger, so as to prevent the defrauded owner from following them further, provided the latter had intended parting with ownership to the deceiver in the first place : though it is otherwise in cases where the circumstances show a transaction lacking this element of a defrauded owner's consent ; where, for instance, possession, but not a right of property, was the right intended to be conferred.¹ And how is it where the finder takes goods which some one has left behind, but which do not appear to be derelict ? The doctrine of Ulpian made it theft for a finder to convert to his own use, *animo lucrandi*, property which he had no reason to believe had been abandoned. Our modern jurisprudence shrinks from applying so severe a test. True, a felonious intent on the finder's part, at the time of appropriation, makes the act criminal wherever he has observed marks or learned facts enabling him to ascertain the true owner. Indeed, the rejection of subsequent as well as simultaneous information, pointing out the true owner, has furnished ground for legal conviction,—the intent manifested at the time of finding, and consistently pursued, to deprive the owner, whoever that owner might possibly prove to be. But, in general, a mere intent to appropriate to one's self something found can hardly be deemed criminal, or justify a prosecution, so nearly is it generated from the universal right of occupancy.²

There are other instances of chattels without an owner, which might appropriately be referred to the general rule of

¹ *Kingsford v. Merry*, 11 Ex. 577. See *Fraudulent Sales*, *infra*, where the subject is considered at length.

² See 2 Kent Com. 357 ; *supra*, p. 14 ; *Reg. v. Moore*, 8 Cox C. C. 416 ; *People v. Cogdell*, 1 Hill, 94 ; 2 Bish. Crim. Law, 5th ed. §§ 812, 813, 881. But there are local statutes which impose special duties on the finder of property, prescribing penalties.

occupancy, though neither derelict, lost or stolen goods, in a strict sense. Such are goods unclaimed in the hands of some trustee or bailee, deposits in a bank, and debts due from parties, where, as often happens, the rightful owner or creditor is not made aware of his rights. It may be, in such a case, that the owner is in ignorance, and would still assert his rights, should any notice reach him ; or it may be he has died. The usual consequence is, that the party who should have handed over the goods, or paid the debt, enjoys ownership and dominion without the trouble of making a discovery ; and, profiting by time and secrecy, he may come at last to own that which he really owed. Over all property of this sort, the State, as trustee for the true owner, should one be found, otherwise on behalf of the public, may properly assume control ; and that legislation reaches in this direction is apparent by reference to recent acts in some of the United States, which require certain corporations to publish regular lists of unclaimed dividends and deposits ; also causing goods transported by common carriers, which remain unclaimed after a certain period, to be advertised, and sold at auction ; the proceeds, after the payment of all expenses and charges, to be turned over to the public treasury.¹ And as to the goods, effects, and credits of persons who have died leaving no known heirs in the State, certain public officers are appointed, under local statutes, with power to demand, collect, sue, and to settle the estate as in ordinary administration ; the State taking whatever balance may finally remain for distribution, in default of a known widow, husband, or kindred, surviving the person deceased.²

On the whole, as the reader must have perceived, the modern means of acquiring title to chattels by occupancy are strictly

¹ Mass. Gen. Sts. c. 80 ; Act 1864, c. 139.

² See *Colchester v. Law*, L. R. 16 Eq. 253 ; *Parker v. Kückens*, 7 Allen, 509.

confined. Not only has the primitive right itself disappeared far into the early domains of history, but occupancy, even as applied to perfected chattels which are casually thrown open to ownership, has been greatly hedged in by sovereign command and public legislation. The tendency of our modern jurisprudence is clearly to take from the individual all title to goods abandoned, lost, and stolen, — to all chattels, in fact, which appear to have no known owner, — and to vest the privileges, present and prospective, of a finder, in the State ; no longer the State as personified in a monarch who grasps at the property for the personal gratification of himself and his favorites, but the State in the generous and enlightened sense of the public, — the whole people. This modern idea is theoretically just ; just, too, in practice, where the expenses of securing the property can be kept down. Policy, and the claims of order and tranquillity, afforded the early justification for public interference with individual occupancy : to this should now be added, the desire to enrich a whole community in preference to single members. But the chief glory of our modern occupancy legislation appears in the humane and just regard which is paid to the dispossessed owner who has never intended abandoning his fundamental rights. Some of the old feudal expedients, such as a brief prescription for clinching a thief's title and confiscation, whereby the king himself became by substitution a robber of the goods for which his subject had swung, have not stood the modern tests. The true owner has now, and always should have had, a fair chance to regain that which had passed from him without his consent ; not even the careless *bona fide* purchaser standing quite as securely as of old. Whenever the State lays hold of the vacant goods, it is, as the drift of American legislation plainly indicates, not only with the intent of subjecting it to the demands of the true owner, whoever he may be, but likewise for instituting a proper search for him ; the chattel, or

its proceeds, finally reverting to the public, in most instances, by a title paramount, indeed, to that of the private occupant, but only perfect as to the former owner, when it becomes reasonably certain that no one exists to claim on his behalf, or there has been a delinquency in asserting his right tantamount to utter abandonment of title.

CHAPTER II.

TITLE TO PRODUCTS ; ACCESSION AND CONFUSION.

HAVING considered how title may be acquired in any chattel, already existing in its perfect state, which may appear at the time to have no owner, we proceed to those things personal which newly present themselves for ownership, because newly produced, — the results of brain creation, or the offspring of animals, or what we call income and profits, or, it may be, the working up of materials of certain kinds to form some new and distinct chattel, or the aggregate of mingled chattels. Let us consider, then, in the present chapter, I. The Title to General Products ; II. Accession ; III. Confusion.

I. As to the title to general products. In patent rights and copyrights, we find useful and valuable kinds of personal property, the creation of human intellect ; and as to all such products, municipal law now regulates and secures the title to the author or inventor for a fixed period. Every one has a natural dominion over his own ideas, whether it be to impart them to others, or confine them to himself : but this natural right is not found sufficient of itself to exclude others in society from making use of such fruits of the brain as are once communicated ; and hence the protection is essential, for the promotion of science and the arts, which legislation now accords in the nature of a monopoly grant to the originator of something new and useful for addition to the world's stock of knowledge. The modern law of patents

and copyrights in England and America rests upon statutes of local force, subject to local modification ; and it is doubtful whether authors and inventors can be said to have had any valuable privileges of this character at the common law, or to enjoy at this day the exclusive benefit of their brain products otherwise than through legislative enactment.¹

The increase of domestic animals generally belongs to the owner of the female, the proprietor of the male taking no share. But, where the female is hired for a limited period, the hirer, in absence of contrary stipulation, will take the increase as temporary proprietor ;² and similar favor has been shown to the beneficiaries with a life interest in such property.³ The beneficial enjoyment of any chattel, in fact, must, of necessity, carry with it the enjoyment of whatever that chattel produces ; and whether it be in the shape of income on invested capital, or profits accruing from the employment of some specific chattel, such as a ship, a coach, or a sewing-machine, the owner for the time being of the principal thing, with a certain definite period of dominion, is the owner, too, of its products. Were the rule otherwise, ownership would frequently prove a burden instead of a blessing. The right to enjoy produce, then, is not always that of the ultimate owner alone : a temporary proprietor for a substantial period, under a suitable express or implied contract, such as the charterer of a ship or the hirer of a coach, is entitled to profits or income as incidental to the beneficial enjoyment for which he contracted. But other considerations would arise if he took the chattel, not as beneficiary, but in trust for some one else, or as mere security for a debt due him, or by

¹ The subject of Patents and Copyrights has been fully discussed in 1 Sch. Pers. Prop. 654-675.

² *Putnam v. Wyley*, 8 Johns. 432; *Stewart v. Ball*, 33 Mis. 154; 1 Sch. Pers. Prop. 79. But see *Allen v. Allen*, 2 Penn. 166.

³ 1 Sch. Pers. Prop. 169; *Horry v. Glover*, 2 Hill Ch. 521.

virtue of some contract which was not intended to give the holder's possession the dignity of a temporary and personal proprietorship.¹ And it is to be observed, that contracts of chattel hire may furnish two sorts of income: one, the hire-money, for the beneficial enjoyment of the owner who lets the thing; the other, the immediate product or profits from use of the thing itself, for the beneficial enjoyment of the hirer, whose actual loss or advantage is in strictness computed by calculating the difference.

II. We come, next, to accession. Personal chattels of the corporeal sort take the widest possible variety of classification and development in an age of scientific progress. The same materials may be applied by human ingenuity to a variety of useful shapes and conditions for valuable purposes. Now, where the several materials which constitute any complete chattel are those of one owner, who has likewise applied his own labor exclusively to its making, it is plain that the chattel is his own, to do with it as he pleases, saving, of course, any rights of an inventor under a patent limiting the use of his ideas, which may have been infringed upon. Thus far, there is no controversy. But supposing the different materials which went to make up the chattel in its present state belonged to different parties; or one owned the materials, while another applied the labor: to whom shall the law assign the ownership of the whole thing? For it may be that the chattel, as now existing, is worth far more than the sum of the materials of which it was composed. It is here that disputes will frequently arise; and the doctrines, at first sight somewhat subtle and abstruse, which the civil and common law have long applied, deserve, therefore, an extended notice.

Under the general head of *Accession* — a topic not wholly confined to new species of chattels, but covering all instances

¹ See Bailments, *infra*.

of chattels united to other chattels, or with the ground naturally or artificially, including the bestowal of one man's work on another man's materials, and with a further application to real property which is beyond the limits of this treatise—are determined questions of title to the new chattel, or the old chattel with its newly incorporated materials, or the land with its annexed chattels, as the case may be. The doctrines of accession come down to us from Rome. Bracton and the year-books recognized them in the earliest period of English law; and they are constantly applied by the courts of the United States at the present day.

The first principle of the law of accession is commonly said to be, that if any given corporeal substance receives afterwards an accession by natural or artificial means, but is not changed into a new species thereby, the original owner of the thing is entitled to the thing in its present improved condition.¹ But this rule is not to be applied without due regard to the closeness with which materials may have been blended; for we are here to suppose, not indeed an entirely new kind of chattel, with its original elements undistinguishable, but such a permanent union of the component parts, that to attempt to take them apart would cause so much damage in proportion to the value of the separate parts as to make severance impracticable. Thus, to attach one's man's watch to another man's chain, or the car of one railroad company to another company's engine, calls for no rule of accession; while sewing one man's silk into another man's coat would. This fundamental distinction between the practically separable and the practically inseparable, though an eminently proper one, is not so obvious as to have been always borne in mind: it suggests, too, that, with modern inventions and appliances, some of the ancient illustrations of accession may become untrustworthy. Nor is the rule of accession appli-

¹ 2 Kent Com. 360, 361; 2 Bl. Com. 404; *Eaton v. Munroe*, 52 Me. 63; *Betts v. Lee*, 5 Johns. 348.

cable without a reasonable regard to comparative values: for, as this word "accession" implies, it is the principal thing, that of the most importance and value, which must draw after it the title to whatever is accessory; and hence the owner of the most valuable component part is he whom the law selects as owner of the whole.¹ To the combination of differing chattels, or the application of special labor to materials, not the mere mingling of things similar, is the term "accession" properly applied.

Most of the modern accession cases involve this important element, — the bestowal of one man's labor in enhancing the worth of another man's materials. And here, again (supposing the materials to have been taken by no wilful trespasser), the test of comparative values should be applied. Thus, if a goldsmith melts up another man's gold into a vase, the owner of the gold becomes the owner of the vase, notwithstanding the goldsmith has supplied accessory labor and some slight materials towards the valuable result. And so with casting bullets. But supposing skilled labor of a high sort to have been bestowed, — as that of an accomplished painter upon a piece of canvas, or a sculptor upon a block of marble, — can any one doubt, the material being of so little value as compared with the artistic work, that the finished painting or statue becomes the property of the artist? It would be ridiculous, say the Institutes of Justinian, that a picture of Apelles or Parrhasius should be deemed a mere accessory to a worthless tablet. Kent says that the Roman law was quite inconsistent on this point; for, if a fine poem or history was written on another man's parchment or paper, the work belonged to the owner of the parchment or paper, and not to the author, — an instance in which Pothier and Toullier lay down the con-

¹ See Bouv. Dict. "Accession," "Adjunction;" 2 Kent Com. 360, 361; 2 Bl. Com. 404; Inst. 2, l. 25, 34; Beers v. St. John, 16 Conn. 322; Wetherbee v. Green, 22 Mich. 311; Pulcifer v. Page, 32 Me. 404.

trary rule.¹ But, as to this last case, the question involved seems not so much that of intrinsic value in filled-up paper, as whether ideas valuable or worthless ought ever to be allowed to go to third parties or the public, against the writer's consent, simply because the latter had expressed them upon paper belonging to a stranger. Would not our law, upon such grounds, confer the title to the writing upon the writer, with compensation to the owner of the paper, even though it were but a private letter of no intrinsic value, instead of some valuable literary production? The general rule is, that the bestowal of labor, whether with or without the slight addition of materials, upon the materials of another, will give to the owner of the principal materials the right to the finished chattel, unless the value of the chattel has become so greatly enhanced by the workmanship as to be out of all proportion to the worth of the materials taken; in which latter case, the principal value consisting in the workmanship and added materials, justice requires that the materials originally taken become the accessory, so as to vest the whole chattel in the party supplying work, with suitable compensation to the owner of original materials.

The first principle of accession laid down by the writers is confined in terms to cases where no new species of chattel is created; or, to use a test, where the identity of original materials is not lost.² Now, some of the examples they furnish — of leather wrought into shoes, of cloth made into a coat, for instance — indicate that their classification is rather broad for the rule; although the test of identity they offer is doubtless better than that still narrower one of the old civil law, — whether the species can be reduced to the former rude materials or not. The importance of some distinguishing test appears from the second principle they

¹ 2 Kent Com. 362, citing *De rer. div.* 2, 1, § 34; Pothier, *Droit de Propriété*, n. 169-192; Toullier, tom. iii. pp. 73-79.

² See 2 Bl. Com. 404; 2 Kent Com. 360, 361.

announce ; namely, that, if an entirely new species has been created, — as wine from grapes, or bread from wheat, — the manufacturer must be deemed the true owner, and is only to make satisfaction to the former proprietor for the materials which he has appropriated.¹ Seldom, however, does a case of accession, in point of fact, come before the courts, in which there has not been, logically speaking, some new chattel produced as the result of an appropriation of materials ; something distinct, of a new market-value, and designated by a different name from any of the materials taken. Instead, therefore, of perplexing ourselves over distinctions between new and old species, it appears more rational to treat the rule of accession as one of convenience throughout ; and to say, that, the identity of the appropriated materials appearing in any present product, the owner of such materials may take the chattel as his own ; but that, if their identity be absolutely lost, he cannot take the chattel from the party who had appropriated those materials, but must look for compensation. And this whole matter of physical identity seems properly qualified, in cases of accession, by the consideration of comparative values, already noticed, and that of wilful or unintentional trespass on the taker's part, of which we are still to speak.

Let us see, then, how far the taker's conduct affects the question of title. The rule against wilful trespass has its foundation in the maxim, that no one should be deprived of his property without his consent. To apply this maxim to the rule of species new and old : how will corn serve as an illustration ? If one's corn be taken and parched, doubtless the owner may recover it in its new condition ; for its identity is not changed. If, instead, it be ground into meal, some of the cases expressly say, that the first principle of accession must still prevail, since there is no new species of chattel created on grinding corn such as to debar an owner from identifying

¹ 2 Kent Com. 363, 364 ; Inst. 2, l. 25 ; 2 Bl. Com. 404.

his materials.¹ But, to go a step farther, suppose the corn be made, instead, into whiskey: does the first, or the second, principle now apply? For assuredly, if illustrations may serve at all, this falls within the class of materials changed into an entirely new species, beyond the power of their identification. It was precisely this last point which the important case of *Silisbury v. McCoon*² presented: and, inasmuch as the corn had been taken from the owner by a wilful trespasser, it was decided, notwithstanding the old books, that the title to the property had not changed; that the whiskey belonged, not to the manufacturer, but to the owner of the corn.³ Admitting that, where the chattel is converted by an innocent holder into a thing of a different species,—as where wheat is made into bread, olives into oil, or grapes into wine,—the original owner cannot reclaim it, the court denied that any such distinction could avail a wilful wrongdoer.

To take one more illustration. A tree squared into timber is commonly mentioned as an instance where original materials may still be identified, and ownership is unchanged. There are cases, too, where wood converted into charcoal has been reclaimed; its substantial identity still remaining as before.⁵ But, in *Wetherbee v. Green*, the process of change had gone farther; for timber cut upon A.'s land had by B. been made into hoops. The court decided that A. could not reclaim his timber in this new shape; partly from regard to this circumstance, perhaps sufficiently decisive of the case, that A.'s materials bore no reasonable proportion to B.'s labor

¹ See *Inglebright v. Hammond*, 19 Ohio, 337; *Mallory v. Willis*, 4 Comst. 76.

² 3 Comst. (N. Y.) 379.

³ *Silisbury v. McCoon*, 3 Comst. 379; *Hyde v. Cookson*, 21 Barb. 92; *Eaton v. Munroe*, 52 Me. 63. And see 2 Kent Com. 363.

⁴ *Betts v. Lee*, 5 Johns. 348.

⁵ *Curtis v. Groat*, 6 Johns. 168; *Riddle v. Driver*, 12 Ala. 590.

and expense in constituting the valuable product ; but chiefly because the evidence showed that B. had been, at most, an involuntary trespasser, and certainly no wilful trespasser at all, in taking that timber.¹

Upon the whole, this modern doctrine of accession appears to be thus properly summed up : One whose personal property has been taken by another without authority may follow and recover it from any wilful trespasser who has worked it into the composition of any chattel which presents the appropriated materials as still capable of identification ; and even, according to the New-York cases, where the materials taken cannot be identified in the new product. Even where the trespass was not wilful, but accidental, as through some mistake of fact, and the materials taken can still be identified, and the labor and materials of the trespasser are not shown to have gone farther than the appropriated materials towards producing the present valuable chattel, the owner of the materials is still entitled to the chattel. But where no element of wilfulness or intentional wrong whatever appears on the part of him who applied another's materials, and the identity of those materials has finally disappeared in the new product, or where it can be shown that his own labor and materials contributed more to the value of the present chattel than those materials which he took without intending a wrong, he shall keep the chattel as his own ; making, however, due compensation to the owner of the materials for what he took. The true object of the rule is, first of all, to protect owners whose rights of property are invaded ; next, to screen an involuntary or casual trespasser, who has expended of his own in good faith, from punishment more severe than mere carelessness or honest error deserves.

Next, as to accession by agreement. Where the owner of

¹ *Wetherbee v. Green*, 22 Mich. 311. The court intimates here a disapproval of *Salisbury v. McCoon*, cited *supra* ; but the two cases are readily distinguishable.

materials parted possession voluntarily, the case will turn upon the mutual intention of parties, as in ordinary contracts. If raw materials be delivered to the mechanic or manufacturer to be wrought into a chattel and returned, the contract is one of bailment, and the title is not changed: the perfected chattel belongs to the owner of the materials, with suitable compensation to the bailee, usually secured by a lien; and this notwithstanding accessory materials are furnished by the latter. And so, too, where any article is left to be repaired, the original substance still constituting the principal portion, and the article retaining its identity.¹ But where the taker agrees to manufacture a certain article out of his own materials, or even to provide the principal part thereof, the title is presumably in himself until the thing be finished and delivered.² Once more: where materials are delivered by an owner to be worked up, the party who takes them not agreeing absolutely to restore them in their new or altered form, but being at liberty to return something similar of equal value, — a sort of contract which the civilians termed *mutuum*, and reckoned among bailments, — our law regards the contract as essentially a sale of materials, so as to divest the original owner of his title.³ For example: if one builds a ship from the keel upwards with another's timber or chief materials, the latter is presumed to be owner of the vessel as the work goes on; while the ship-builder himself remains the owner of the unfinished vessel, if he supplied the whole or most of the materials, even though he may have purchased certain materials outright from the contemplated owner of the finished

¹ *Babcock v. Gill*, 10 Johns. 287; *Foster v. Pettibone*, 7 N. Y. 433; *Eaton v. Lynde*, 15 Mass. 242; *Stevens v. Briggs*, 5 Pick. 177; *Pulcifer v. Page*, 32 Me. 404; *Worth v. Northam*, 4 Ire. 102.

² *Gregory v. Stryker*, 2 Denio, 628; *Merritt v. Johnson*, 7 Johns. 473; *McConihe v. New York, &c. R. R. Co.*, 20 N. Y. 495.

³ *Story Bailm.* §§ 219–222; *Lonergan v. Stewart*, 55 Ill. 44; *Hurd v. West*, 7 Cow. 752. And see, as to Hire of Personal Property, *post*.

vessel.¹ And so, too, the man who patches up my boat, or mends my broken carriage, acquires no title to the property ; but it would be otherwise if the boat or carriage were so far worn out when delivered to him, that the workman took the chattel merely for accessory stuff towards the production of something new of his own manufacture.² To rules like the foregoing, exceptions are found corresponding to the variations of mutual intent ; as in the sale of chattels made to order, and payable by instalments at certain stages of the work.³ Doubtless a valid sale can be made of an unfinished article ; in which case, all materials and labor afterwards applied by the seller would pass with the principal under the usual rule of accession.⁴

So, too, the mortgage or pledge of chattels, properly made and carried into effect, by delivery or record according to law, is presumed to cover any subsequent product of which those chattels constitute the sole or chief component ; and generally such other accessory materials as the mortgagor or pledgor may afterwards have added ; this, of course, not by way of immediate ownership, but for strengthening the security.⁵

When any chattel is firmly annexed to land, it becomes incorporated with the land, and converted into real estate, on the long-established principle that chattels are but accessory to land. Hence is it, that where one puts up a building on another's land with his own materials, or upon his own land with another's materials, the right of the erection goes with the soil, according to the civil and common law alike ; for every building is deemed an accession to the ground

¹ See 2 Kent Com. 361, 362; *Merritt v. Johnson*, 7 Johns. 473.

² 2 Kent Com. ib; *Gregory v. Stryker*, 2 Denio, 628; *Beers v. St. John*, 16 Conn. 322.

³ The subject is considered under "Sales," *post*.

⁴ *Sumner v. Hamlet*, 12 Pick. 76.

⁵ *Cudworth v. Scott*, 41 N. H. 456; *Putnam v. Cushing*, 10 Gray, 334; *Bryant v. Pennell*, 61 Me. 108; 1 Sch. Pers. Prop. 509, 537-540.

whereon it stands.¹ And this doctrine is applied to trees, plants and seeds, set out or sown in another person's land.² Justice would seem to demand, however, that, where there had been no wilful trespass committed, the owner of the land should make some compensation to the owner of the chattel in consideration of the enhanced value of his premises. Nor is the rule without qualifications as concerns the land-owner's title.³ For granting that a house in process of erection upon another's land becomes the property of the land-owner as fast as the parts added become incorporated with the soil, yet the plank, mortar, brick, and other materials composing it, are personal, not real property, until permanently affixed to the freehold; and, as the hirer of chattels for a fixed term becomes temporary proprietor, so peculiar considerations may arise in favor of a lessee of land as against his lessor, whether the annexation were made by himself or some stranger.⁴

If one man's chattels are carried upon another man's land by an inevitable accident, — as where some violent wind or flood carries off fruits, timber, or uprooted trees, — the one party is without remedy for the damage occasioned, if the other choose to leave him so by not reclaiming his property. But the Roman law made even such owner of chattels responsible, unless he utterly abandoned them; for if he chose to reclaim his property, and proceeded to remove it, he became at once liable for all damage occasioned to the owner of the soil by the casual deposit. And the same rule is expressly adopted in New York.⁵

III. We come now to Confusion, — a doctrine akin to that

¹ 2 Kent Com. 362; *Miller v. Michoud*, 11 Rob. La. 225; *Bouv. Dict.* "Accession;" *Fryatt v. Sullivan Co.*, 7 Hill, 529.

² *Ib.*

³ *Johnson v. Hunt*, 11 Wend. 135; *Gallup v. Josselyn*, 7 Vt. 334.

⁴ *Beers v. St. John*, 16 Conn. 322; 1 Sch. Pers. Prop. 61, 71.

⁵ *Sheldon v. Sherman*, 42 N. Y. 484; 1 *Domat Civ. Law*, pt. 1, b. 2, tit. 9, § 2.

of accession, but applicable to mixed chattels of one and the same general description, instead of various materials, or materials and labor united into a single product. Here, too, the common law has apparently followed that of the Roman empire; not, however, without modification. Confusion of goods arises wherever the goods of two or more persons are so blended as to have become undistinguishable.¹

Whatever the kind of property, the law makes no arbitrary disposal of the title beyond what necessity or convenience requires. Where the articles mixed together differed in value or quality, and the original value or quality of each component cannot now be clearly determined, the law of confusion must settle who is the owner. But, according to Lord Eldon, if the corn, flour, or other goods found mixed together, were of equal value, then even the injured party takes his proportional part, and no more.² Furthermore, the law of confusion does not apply to chattels of a sort to be readily distinguished and separated,—as in general instances of cattle, produce packed in barrels or boxes or bales, furniture, and so on; for so long as one can identify his own chattels, and take them away, the ownership of articles need suffer no change because all happen to be lumped into one lot.³ And yet the case might be conceived where the mixture of barrels, boxes, or bales, articles of furniture, or even animals of various values and without brand or mark to identify, had resulted in an undistinguishable mass. That which keeps out the rule of confusion, and preserves the title to separate portions unharmed, must be, after all, either this identity of particulars, which has prevented any close mixture from taking place, or

¹ 2 Kent Com. 364, 365; Bouv. Dict. "Confusion of Goods;" 2 Bl. Com. 405; Inst. 2, l. 27, 28.

² 2 Kent Com. 365; *Lupton v. White*, 15 Ves. 432; *Spence v. Union Mar. Ins. Co.*, L. R. 3 C. P. 427.

³ *Seymour v. Wyckoff*, 10 N. Y. 213; *Holbrook v. Hyde*, 1 Vt. 286; *Robinson v. Holt*, 39 N. H. 557; *Ames v. Miss. Boom Co.*, 8 Minn. 467; *Smith v. Sanborn*, 6 Gray, 134; *Alley v. Adams*, 44 Ala. 609.

else equality of the ingredients in quality or value, so as to enable ownership to fasten readily upon its precise share in the mass, though detached from its former physical particulars.

And, now, to examine this law of confusion in detail. Whenever a confusion of personal property has actually occurred, and the question of title presents itself, we should ask at once, What caused that confusion? Did it take place by mutual consent; or by one's wilful misconduct; or through one's unintentional mistake of fact; or because of inevitable accident or superior force? And according as the mixture was brought about by one or another of these four general causes, so, according to the modern current of English and American authorities, should the title to the mass be determined.

(1.) If by mutual consent, the title to the whole is founded in contract; and hence arises the presumption, in absence of special stipulation to the contrary, that the two contracting parties agreed to take the mass together, by way of ownership in common, in proportion to their several shares.¹ Here ownership might be considered as founded rather upon contract than in confusion at all.

The consequence of ownership in common in a divisible mass must needs be, that each proprietor has a right to dispose of his undivided share, and may sue any one who would appropriate the whole to the exclusion of his own interest.² And while the ordinary presumption, in chattel relations of this character, is, that the sole possession of one is the possession of all, divisible personal property so far differs from indivisible, that the exclusive appropriation or sale by one may be readily construed into an act of conversion, so as to enable the injured co-owner to maintain trover for his portion.³ Each co-owner,

¹ 2 Kent Com. 364, 365; 2 Bl. Com. 405. And see 1 Sch. Pers. Prop. 193-196, as to ownership in common.

² 1 Sch. Pers. Prop. 196.

³ 1 Sch. Pers. Prop. 197, 201.

too, has the right to sever and appropriate his own share, wherever it may be determined by measurement, weight, or count; and, indeed, the courts seem to encourage so sensible a practice, as though reluctant to compel any formal partition of the mass.¹ The relation of common ownership, under circumstances like these, ought to be regarded as a temporary state of things, with severance and separate appropriation to follow speedily; though, while the mass remains intact, the law protects the contributors after a somewhat clumsy fashion.

But it is evident that the relation of the parties who consent to an intermixture of their goods may be varied by their own contract. It is not necessarily an ownership in common in every instance. To ascertain and give proper expression to their mutual intention in such cases is often a matter of great perplexity, as will further appear when we come to examine the legal distinctions between sales and bailments. The transportation of grain in large quantities from our Western States, with the intervention of warehousemen and elevators, gives frequent occasion for applying the doctrine of confusion by consent.² Here the owner of a certain quantity agrees, perhaps, to its intermixture with other lots belonging to other parties, or to the warehouseman himself, taking a written receipt, which may enable him or the party to whom he may transfer it to demand an equal amount of the same quality, if not the identical grain which he has put in. Such contracts vary; and sometimes the bargain will contemplate a restoration of the identical property delivered, though possibly in a different shape. To determine who shall bear risks and enjoy dominion while such an intermixture lasts, we must have recourse to the character of the transaction; for

¹ *Ib.*; *Fobes v. Shattuck*, 22 Barb. 568; *Dole v. Olmstead*, 36 Ill. 150; *Morgan v. Gregg*, 46 Barb. 183; *Young v. Miles*, 20 Wis. 615; *Channon v. Lusk*, 2 Lans. 211; *Tripp v. Riley*, 15 Barb. 333. See *Kimberly v. Patchin*, 19 N. Y. 330.

² See 6 *Am. Law Review*, 450-471, "Grain Elevators."

rights and responsibilities go according to the legal title. If the nature of the bargain be such as to make the several proprietors owners in common of the mass, any loss should be borne by them in proportion to their several interests; and such an ownership, we have said, is usually presumed.¹ But if one throws his goods into the common mass, on the understanding that the party receiving them may take from the mass at pleasure and appropriate to himself on the condition that he shall restore other goods of the same sort in their stead, and so, too, in stipulations for pecuniary compensation, the dominion over the property passes to the receiver; and on this principle are some of our grain cases decided, the party owning the elevator or warehouse being treated as a purchaser, and not as a depositary.² In the instance of a mere depositary, on the other hand, and, indeed, wherever one takes goods on a contract to bestow care or labor upon them and restore the identical goods in the same or a different shape, the property remains in the original owner; and the receiver incurs no liability, except it be through a violation of duty.³ Where the party receiving the goods takes them by consent both for purposes of bailment and mixture with his own goods, as is sometimes done, the title of the contributing owner is put at extreme hazard; yet even here a common ownership in the mass between contributor and receiver should be presumed.⁴ Business usage will often aid in solving the nature of all such transactions.⁵

Replevin is not the suitable remedy for one's undivided interest or share in an intermixture by consent, since it is

¹ *Chase v. Washburn*, 1 Ohio, N. S. 244, per Bartley, J.; *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427, *supra*, p. 42.

² *Lonergan v. Stewart*, 55 Ill. 44; *Ewing v. French*, 1 Blackf. 353; *Chase v. Washburn*, 1 Ohio, N. S. 286; *Wilson v. Cooper*, 10 Iowa, 565.

³ *Chase v. Washburn*, *supra*; *Young v. Miles*, 23 Wis. 643.

⁴ *Inglebright v. Hammond*, 19 Ohio, 337; *Slaughter v. Green*, 1 Rand. 3.

⁵ See *Cushing v. Breed*, 14 Allen, 376; *Warren v. Milliken*, 57 Me. 97; *Dole v. Olmstead*, 41 Ill. 344.

incapable of exact identification ; though it is otherwise with wrongful intermixture, for reasons which will presently appear.¹

(2.) If by one's wilful misconduct, the offender must bear the loss ; for it has long been settled at the common law, that where personal chattels, solid or fluid, are so mingled as to have become undistinguishable by the wrongful act of one owner, he cannot recover for his own proportion, nor for any part of the intermixture, but the entire property vests in him whose right was invaded.² Nor is the latter obliged to compensate the former, in such a case, according to our laws ; in which respect, many have thought that we differ from the civilians : for the gist of the rule appears to be, the natural justice, on the one hand, of allowing the intentional trespasser to be the loser by his own wrongful act ; and, on the other, the injustice of permitting any innocent owner to be deprived of property without his consent. The intermixture being such, then, that the proportions are undistinguishable, the injured party may replevy the whole, or sue in damages for its value.³ But, if the injured party has transferred his interest, his assignee should make a demand upon the wrongdoer holding the intermixture before bringing a suit.⁴

Upon a similar reasoning, where A. takes goods doubting whether they are his own or not, and intermingles them in order to mislead B., the true owner, and to prevent B. from taking his portion without danger of taking A.'s likewise, it is said that A., by such fraudulent act, loses his own property.⁵

¹ c. f. *Low v. Martin*, 18 Ill. 286 ; *Warner v. Cushman*, 31 Ill. 283 ; *Dillingham v. Smith*, 30 Me. 370.

² 2 Bl. Com. 405 ; 2 Kent Com. 365 ; *Ryder v. Hathaway*, 21 Pick. 298 ; *Stephenson v. Little*, 10 Mich. 433 ; *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427.

³ *Ib.* ; *Jenkins v. Steanka*, 19 Wis. 126 ; *Beach v. Schmultz*, 20 Ill. 185 ; *Warner v. Cushman*, 31 Ill. 283.

⁴ *Root v. Bonuema*, 22 Wis. 539.

⁵ *Morton, J.*, in *Ryder v. Hathaway*, 21 Pick. 298.

That he runs, at least, the risk of losing his own, cannot be doubted; for reckless conduct evincing a dishonest intention, whether shown in actively seizing one's neighbor's goods or in permitting another to intermingle them with his own, is a suitable ground for rigidly enforcing the rule of confusion. A large proportion of the later decisions in this country are those involving fraud upon creditors; cases where the party causing the confusion of goods — sometimes the debtor himself, sometimes a party in probable collusion with him — seeks to perplex and hinder officers attaching on the creditor's behalf. It may be affirmed, as a rule, that one conniving at a scheme of this sort, though not, perhaps, the active trespasser nor the debtor, has the burden thrown upon him of identifying his own goods in order to exempt them from sale under the attachment. He, and not the creditor, must bear all the inconvenience arising out of the confusion; and if he fails to distinguish and separate what belongs to himself, the whole may be sold as the debtor's property.¹ This is because his motives are open to suspicion, if not clearly fraudulent.

So, too, is it with one who has charge of another's property, and so confounds it with his own that it cannot be distinguished; for breach of trust could hardly be honestly committed in the eye of the law. However extenuating the circumstances, the party causing the confusion will lose his own property if he cannot identify and separate it from the mass; and if damages are given to the plaintiff for the loss of his property, the utmost value will be taken.² It is a cardinal duty of all trustees to keep the fiduciary property separate

¹ *Beach v. Schmultz*, 20 Ill. 185; *McDowell v. Rissell*, 37 Penn. St. 164; *Smith v. Welch*, 10 Wis. 91; *Treat v. Barber*, 7 Conn. 275; *Chappell v. Cox*, 18 Md. 513; *Weil v. Silverstone*, 6 Bush, 698; *Dillingham v. Smith*, 30 Me. 370; *Robinson v. Holt*, 39 N. H. 557. See *Harding v. Coburn*, 12 Met. 342.

² *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Ringgold v. Ringgold*, 1 Har. & G. 11; *Brackenridge v. Holland*, 2 Blackf. 377; *Carlton v. Conroy*, 21 Cal. 170.

and distinct; and law and equity alike hold them strictly to its observance. But factors and other agents, in accordance with business usage and the nature of their agreements, and even trustees, are sometimes permitted to mingle the property of two or more for whom they act into one fund or mass, without incurring a personal liability.¹ In the analogous cases of chattels specifically pledged or mortgaged for a debt, confusion will sometimes effect an extension of the creditor's security, and sometimes impair or take it away altogether; for if the debtor, having possession, mingle the pledged or mortgaged goods with other goods of his own, they are all brought under cover of the original security because of his misconduct; while the creditor in possession, who is guilty of a corresponding intermixture, must bear the consequences of his folly.² So, too, would it be with specific property set aside by the agreement of debtor and creditor for a certain purpose, and then intermingled with other goods by the one or the other.³

(3.) If by one's unintentional mistake of fact, there being no evidence of wilfulness, it seems to be now well settled, whatever doubts were formerly entertained, that the party causing the confusion will be protected in his rights, so far as the circumstances of the case fairly permit. Even negligence, where the element of wilfulness or fraud is wanting, does not necessarily divest the careless owner of his property. Such is the rule announced when one owner takes another's goods and confuses them with his own, thinking they are his, or believing that he has a right under a contract so to do; and,

¹ See *Hamilton v. Cunningham*, 2 Brock. 350; *Sch. Dom. Rel.* 474; *Hill Trustees*, 379-384; *Perry Trusts*, § 447; *Cook v. Addison*, L. R. 7 Eq. 466. As to property taken by the partner of a firm, see *White Mountain Bank v. West*, 46 Me. 15.

² See *M'Kean v. Wagenblast*, 2 Grant, 462; *Fuller v. Paige*, 26 Ill. 358; *Cook v. Addison*, L. R. 7 Eq. 466; *Webster v. Power*, L. R. 2 P. C. 69; *Dunning v. Stearns*, 9 Barb. 630.

³ *Huff v. Earl*, 3 Ind. 306.

in general, wherever his mistake is an honest one.¹ And yet, while the courts show an obvious disposition to shield the unintentional trespasser from loss, they are not as yet bold in declaring the parties owners in common of the entire intermixture, — a consequence which would doubtless follow, were the equities of the two precisely alike: notwithstanding, such must logically be the result, when all means of identification have failed. But to allow the unintentional trespasser a fair opportunity to point out and separate his portion of the mass, — which, in the case of solids brought together, might be possible, if he, though no one else, knew of distinguishing marks, — they certainly concede.²

Where the owner originally invaded has taken away the whole intermixture, it is said that he may be sued in assumpsit for the value of the innocent invader's goods, if he has sold them; otherwise, in trover after a demand and refusal.³ But it has been decided, that unless the invaded owner took away the whole intermixture as an intentional trespasser, or used goods knowing them to belong to the innocent invader, there should be a demand upon him, followed by refusal, before suit; that an action of account at law is not the innocent invader's proper remedy in such a plight.⁴ When it comes to a demand, and the holder of the intermixture, instead of refusing, tells the other party to point out his property, the latter is in an awkward dilemma. Plainly, then, the party already in possession has the decided advantage, — a rule which will always hold true of common ownership in chattels; and that the common-law remedies can avail little for breaking up the mass, or dissolving the relation, we have elsewhere seen.

¹ *Pratt v. Bryant*, 20 Vt. 333, per Redfield, J.; *Ryder v. Hathaway*, 21 Pick. 298, per Morton, J.; *Hesseltine v. Stockwell*, 30 Me. 237; *Wetherbee v. Green*, 22 Mich. 311; *Thome v. Colton*, 27 Iowa, 425.

² See *Chappell v. Cox*, 18 Md. 513; *Moore v. Bowman*, 37 N. H. 494.

³ *Ryder v. Hathaway*, 21 Pick. 298.

⁴ *Pratt v. Bryant*, 20 Vt. 333; *Smith v. Morrill*, 56 Me. 566.

Perhaps equity would decree a partition, and yet the practical difficulty is to make equitable partition at all. If the parties cannot agree upon a fair division of the bulk by measure or weight, a sale and distribution of the proceeds offer the most appropriate remedy; and perhaps a bill in equity would be entertained for that purpose.¹

Presumably, where the confusion of goods is caused by a stranger, the several owners of the ingredients, neither of whom is at fault, would become common owners of the intermixture; for, as their equities are the same, why should one be deprived of his property rather than another?² The rule of comparative values seems never to have been applied to confused goods, as in products by accession, so as to give the whole to the owner of the most valuable portion, on due compensation to the other. Between entire innocence and wilful trespass lies the medium of unintentional error; and besides trespass by an entire stranger to the ingredients, and trespass by an owner thereof, we may reckon trespass by a third person to which this same owner is a privy or principal. It is, probably, because of the legal uncertainty as to how much blame should be imputed to him, or how far the intermixture was caused by his own direction, that we find courts laying down their rules rather cautiously as against the owner of goods which have become mingled with those of a debtor attached in controversies with a creditor. If he voluntarily suffers his goods to become so mingled, whether wilfully or only negligently, the burden of identifying his goods is thrown upon him, notwithstanding the act of confusion was that of another. So much the courts declare.³ But is he punishable further? Most probably, if the wilfulness and wrong can be brought to his door, so as to make him substantially the

¹ See 1 Sch. Pers. Prop. 202, 203, where the remedies of co-owners are considered; *Fobes v. Shattuck*, 22 Barb. 568.

² See *infra*, as to confusion by accident.

³ See *Beach v. Schmultz*, and other cases, *supra*, p. 46.

aggressor of a third person's creditor, he will forfeit all title to his own goods; but not otherwise. It is, at all events, the business of the owner, who, wilfully or carelessly, has allowed his goods to become confused with those of a debtor, to point out to the officer what belongs to him. And since his own duty is to attach the debtor's goods, whether so mingled or not, the officer is no trespasser merely for having attached, in good faith and with due care, those of another blended in the same mass; but if, after the attachment, the owner identifies his own goods and demands a redelivery of them, the officer must surrender them, or else be held liable for their conversion.¹ In cases of doubt, the officer will be justified in delivering up on demand the least valuable articles corresponding to the claim.² But, in every attachment of goods found blended with those of a debtor, an owner's rights, if known, are to be respected; and, where unlawful motive for the intermixture is not known to exist, the officer should give every reasonable opportunity for a separation of goods; for if he covers by his attachment goods known to belong to another, and takes them with a determination to hold them fast, he is liable in trespass at the owner's suit.³

(4) If because of inevitable accident or *vis major*, the rule is at length well established, that the parties whose goods have become intermingled shall own the mass in common; and this, too, whether the intermixture be of fluids or solids. Any other disposition of the title under such circumstances would be unreasonable; for, as both parties stand equally entitled to relief, the law may not assign the whole mass to one of them rather than the other. And if to neither, then the alternative presents itself, quite as repugnant to good sense,

¹ Treat v. Barber, 7 Conn. 275; Shumway v. Rutter, 8 Pick. 443; Robinson v. Holt, 39 N. H. 557; Roth v. Wells, 29 N. Y. 471; Taylor v. Jones, 42 N. H. 25.

² Shumway v. Rutter, 8 Pick. 443.

³ Smith v. Sanborn, 6 Gray, 134; Moore v. Bowman, 47 N. H. 494.

of treating the accidental intermixture as *bona vacantia*, and open to the public for appropriation. The whole question was carefully considered in the recent case of *Spence v. Union Marine Ins. Co.* ;¹ a controversy having arisen over the title to cotton which belonged to different owners, but was shipped in the same vessel. Exposure in a sea peril had caused all the marks of identity to be effaced ; and in this state the ownership of the cotton was at issue. It was determined that neither the principle of wrongful admixture, nor that of goods without an owner, could apply ; that, as inevitable accident had caused the confusion, no owner could be said to have lost his own property ; but the title to the whole was vested in them together by way of ownership in common ; and an adjustment was ordered accordingly.² The same rule is recognized in this country.³ And it may be generally affirmed, that wherever the confusion is such that no blame can be imputed to any owner of ingredients, where it is solely the result of inevitable accident, or the invasion of some superior hostile force, or even, as it would appear, the wrongful act of any stranger to the goods, the result is not to deprive any one absolutely of his property, but to make the former proprietors owners in common of the solid or fluid intermixture : each according to his due share, if strict apportionment be practicable ; otherwise, in equal portions.⁴ And, if a partial destruction has taken place, the loss should be proportionally shared.⁵

It follows that, if one co-owner of property thus thrown together into an undistinguishable mass gathers and takes

¹ L. R. 3 C. P. 427.

² *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427. And see *Lupton v. White*, 15 Ves. 442 ; *Buckley v. Gross*, 3 B. & S. 574 ; *Jones v. Moore*, 4 Y. & C. 351.

³ *Moore v. Erie Railway Co.*, 7 Lans. 39.

⁴ See remarks of Blackburn, J., in *Buckley v. Gross*, 3 B. & S. 566 ; *Bryant v. Ware*, 30 Me. 295.

⁵ *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427.

possession of the whole, he is not usually liable as for conversion to another co-owner ; but his possession is to be regarded rather as rightful, and subject to the other party's right to appear and take out his own portion. He is entitled to compensation for his labor in protecting the whole ; and, even where he has consumed more than his rightful share, he is held bound to make his co-owner whole and no more.¹ That the common law does not readily interfere with one co-owner's possession of chattels, has been already perceived ; and yet as to divisible chattels, like grain and timber, we apprehend that one's intent to appropriate exclusively to himself what he knows ought in fairness to be divided may be inferred under suitable circumstances from his conduct, so as to render him liable in trover to his fellow-owners.²

What was the law of confusion as expounded in the enlightened age of Roman jurisprudence, is not clearly ascertainable. Some have asserted that one rule of title applied to *confusio*, or the mixture of fluids ; and another to *commixtio*, or the mixture of solids ; that in the one case, whether the mixture were by accident or mutual consent, the whole substance was owned in common ; while, in the other, mutual consent alone could confer such a title, the judge being left free to divide an accidental mixture or not, as he might prefer.³ The reason of this distinction seems a fanciful one ; namely, that in solids, but not in fluids, each particle remains the same, although it cannot be easily distinguished. But foreign jurists are by no means agreed that the Roman law ever made any such distinction between fluids and solids : illustrations are not at hand to support it. On the contrary, some assert that this alleged difference of principle between *confusio* and *com-*

¹ Moore v. Erie Railway Co., 7 Lans. 39.

² See 1 Sch. Pers. Prop. 200, 201.

³ See Colquhoun Rom. & Civ. Law, §§ 988, 990.

mixtio is altogether modern.¹ Certainly, no distinction, beyond a verbal one, between solids and fluids in a confused state, is recognized by English or American law; and our rule of confusion applies with the same force to timber, cotton-bales, and grain, as to wine and oil, as the cases already cited will amply show.

In many respects, the doctrines of accession and confusion are seen to be quite similar. Under whichever of these heads the question of title is presented, we find the courts inquiring into the causes which led to the existing state of things; ready to punish the wrong-doer, if need be, and sedulous to protect the innocent owner at all hazards; distinguishing, however, between wilful and unintentional trespass, in order that honest error may not be too severely punished; and, in these later days, certainly, construing the rule as essentially one of necessity and convenience, with a harsh remedy which should be invoked only when the opposing titles have become too closely blended for the ordinary rule to work smoothly, that each shall enjoy his own. Nor has the physical condition of the product or mixture much to do with the issue of ownership, if the present drift of the decisions may be trusted, beyond determining whether it be practicable or not to distinguish and separate without injury what each has contributed. But in one important respect the two doctrines widely differ. The law of accession takes into account, as we have seen, the relative value of components, and inclines to confer the title to the whole upon the greater contributor, leaving the lesser one to his suitable recompense rather than permit him to become a co-owner. Into the law of confusion, on the other hand, this element of relative value does not enter; the contributor of a tenth part has as distinct

¹ Gaius, by Poste, pp. 166, 167, 171; Story Bailm. § 40; Willes, J., in *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427.

a right as the contributor of nine-tenths ; and, instead of permitting the larger title to draw in the lesser, the law remits both parties, all other things being equal, to their rights as owners in common, from which awkward relationship a partition or sale of the property affords, as we have shown, the mode of escape. This difference of principle, we conceive, is founded in convenience. For accession exhibits, as its usual product, something which cannot well be divided up,—a sort of integer for beneficial enjoyment,—while the proper result of confusion or intermixture would be a mass naturally capable of fractional subdivision and beneficial ownership in the severed portions. Again, the cloth into which another's wool has been woven, or the hoops wrought out of another's iron, derive their new value largely from the appliance of skilful labor ; so that one finds frequently, in the product of accession, something worth far more than any of the original materials which entered into its composition ; while from the confusion of goods comes a substance worth little or nothing beyond the value of its component parts, and to which the personal labor of mixing can hardly have contributed, unless it be to the injury of ingredients. The bestowal of useful labor should always strengthen one's title. And, once more, this same element of useful labor must render the adjustment of shares on an arithmetical basis far more difficult in the case of accession than in that of confusion. It is from the combination of these three considerations, we may conclude, that the law, working out the demands of natural justice, makes so marked a distinction between the results of accession and confusion.

PART V.

TITLE TO PERSONAL PROPERTY BY GIFT.

CHAPTER I.

GIFTS IN GENERAL.

To the voluntary transfer of a thing without consideration, the term *gift*, which in our law corresponds with the *donatio* of the civil law, is commonly applied; the word sometimes signifying, in common speech, the thing bestowed, and sometimes the method of bestowing.¹

This mode of acquiring personal property has doubtless prevailed from the earliest ages; and, in the customs of all countries known in history, gifts from sovereign to subject in recognition of merit, from subject to sovereign to gain favor, and between rival potentates in furtherance of a special embassy, have borne an important part in ceremonial intercourse. Greece feared Pisistratus because of the presents he made to citizens, and despised Themistocles for those he took from them.² Under the Roman emperors, the custom of bestowing gifts was universally recognized; and a controversy arose among the lawyers as to whether the Institutes of

¹ See Bouv. Dict. "Gift," "Donation;" 2 Kent Com. 437; 1 Dom. Civ. Law, Part I., Book 1, Tit. X.

² See Smith's Greece, B. 1, c. 11; B. 4, c. 22.

Justinian were right in classing among the civil modes of acquisition what must have been good by the law of nature. Clients at Rome sent gifts to their patrons for managing their legal or other business; freedmen, by way of recompense for services; slaves, on the birthdays and other special festival occasions observed in their master's family. New-Year's gifts have been traced far back into the fabulous era of the city's foundation; and on this day, it is said, the poorer classes were wont to make presents of sweet things of various kinds as a good omen, whence probably originated the modern practice of throwing sugar-plums about at the carnival celebration. The rich on such days would send gold and silver to the officers of state, and particularly to the emperors, who were wont to accept of magnificent New-Year's presents, from the time of Augustus downward; a practice which Tiberius and Claudius tried to check by edict, but with no real success. The Saturnalia was another occasion for promiscuous gift-making. Nuptial gifts, which largely stimulated fortune-hunters of a matrimonial bent; presents to strangers, presents to magistrates,—all of these, with other classes of gifts far more questionable, have come down in history illustrated by the learning of Justinian's age, to attest the prodigality and corruption of a declining empire.¹

Gifts for benevolent purposes—to endow places of worship, seminaries, and hospitals, and for alleviating the sufferings of the destitute and deserving—were doubtless not unknown in the days of paganism among others of a less disinterested sort, which the law has better preserved; yet charity has borne its best fruit in these later centuries, and under the humanizing influences of the Christian religion. The desire, however, of power and influence, of esteem among men, of winning a friend and propitiating an enemy,—all these are among the active principles of our being; gratitude, too, the

¹ Colquhoun's Rom. Law, §§ 1050, 1051.

love of family, friendship, and that wider affection for humanity which prompts the generous possessor of goods to impart of his abundance to those who have not. Hence no artificial system of laws is needed, no social polish, to give easy play to machinery whose motive power lies deep in the human heart. So simple and natural is the legal transaction itself, and this is particularly true of chattel gifts, that the courts of England and America have hitherto elaborated but little beyond the question of a suitable delivery, and never were perplexed for leading rules until the modern classes of incorporeal chattels came into existence. But the subject is one of growing importance, and deserves more than the meagre attention which our text-writers have hitherto bestowed upon it. Let us examine it somewhat in detail; confining ourselves, for the present chapter, to the more general features which this mode of transfer presents.

And, first of all, to look into the matter of consideration with reference to gifts. As a motive exists for every action, and human conduct is usually the result of a nice combination of motives, very little reflection should serve to convince us that what we call a gift is seldom made in the spirit of pure disinterestedness; and if self-examination will so often disclose the base alloy, how can such a transfer be deemed gratuitous or without consideration? But the law does not look so far below the surface for its reasons. When no pecuniary consideration passes back as an understood part of the transaction, nor any service is performed by way of an understood equivalent, the transaction, viewed from the legal standpoint, can hardly be otherwise than a gift. To call it bargain and sale would be to insult the parties. But the civil law of Justinian's age followed human nature rather more closely; for it classified gifts into *simplices*, or such as one makes of his own free-will, and *remuneratoriæ*, or those implying some consideration. And such a division was apparent in

gifts *inter vivos*, which might be of the remunerative sort, or absolute, — that is, made without special reason, or, as one might say, out of pure liberality.¹ But the legal rule did not even here undertake to dissect the inner motives closely; the Roman law differing from ours mainly in treating as an honorary gift what we should now claim as compensation for services rendered.

And yet so ready is our common law to sustain an agreement as such by finding a consideration to bottom it upon, that a mutual stipulation, or some detriment suffered at the promising party's instance, is legally construed into a valuable consideration, and not benefits alone actually gained or expected by the party promising. This anxiety of the law to find a consideration is not strange; since consideration is said to be the very life and essence of a contract, so that a promise for which there is no consideration could not be legally enforced. And hence, notwithstanding the assertion constantly to be found in the cases which relate to gifts, that there exists an opportunity for repentance before one designing to make a gift has actually executed his intention, the courts not uncommonly hold one bound by his voluntary promise to give to some charitable object, simply because he has signed a subscription paper to that effect, and other parties have acted upon the faith of his promise.² In other words, a naked promise to give, without a stipulation for any thing in return, would be deemed voluntary and not enforceable; but the consequences flowing from such a promise to other parties concerned therein may give it mutuality, and raise such a consideration as to render it no longer gratuitous, but an enforceable contract.

A consideration, it is well understood, need not be adequate, or stand as an equivalent, in order to support a contract. The

¹ Colquhoun's Civ. Law, §§ 1050, 1051, 1059.

² See *Mirick v. French*, 2 Gray, 420; *Ives v. Stirling*, 6 Met. 310.

common law, too, has usually gone so far as to presume conclusively, wherever a seal is affixed to an instrument, that a valuable consideration has actually passed, though time and again the man who executes a bond as surety does so from motives of friendship, and without the expectation of any recompense whatever. And, under the Roman law, gratuitous promises were enforceable, when made with the observance of certain formalities which implied deliberate intention; a principle often observable in the codes of modern Europe, where certain instruments are to be solemnly executed before a notary, and in presence of several witnesses.¹ But friendship, good-will, or any merely moral obligation, cannot suffice as a consideration to support a contract at our law; nor even blood or natural affection between near relatives, though this might have technically supported a use or a trust executed in equity.² Yet marriage is a valuable consideration, and will sustain any reasonable family settlement made on the faith of it.³ All these are doctrines well established under the law of contracts, which serve to indicate to what extent a promise may be pronounced gratuitous or without consideration; and hence appropriate to transfers by way of gift.

Our earlier writers of the common law, so far as they have given the subject any attention, appear to have regarded gifts of personal property, because of this usual absence of a supporting consideration, and perhaps, too, because the mode of transfer was so simple, as a class of transactions quite distinct from contracts. And this might be proper enough, if Blackstone's definition of a contract be taken as strictly correct; namely, an agreement "upon sufficient considera-

¹ 1 Pars. Contr. 6th ed. 427-430.

² 2 Bl. Com. 444, 445, n. by Chitty, &c.

³ *Magniac v. Thompson*, 7 Pet. 348; *Sch. Dom. Rel.* 263 *et seq.*

tion" to do or not to do a particular thing.¹ But Kent, while adopting this definition, is hardly satisfied with the alleged distinction. "Every gift which is made perfect by delivery, and every grant," he says, "are executed contracts; for they are founded on the mutual consent of the parties, in reference to a right or interest passing between them."² This proposition is undoubtedly correct; and the best authorities of the present day not only take the same view of perfected gifts, but have also enlarged the definition of a contract; and they treat the element of consideration as a non-essential for classifying, though practically an essential when it comes to the matter of legal enforcement.³

This question is not a purely abstract one, however; for, whether we use the term "contract" or "agreement" as legally appropriate, we should make sure of what is a fundamental fact, that gifts are in the nature of a mutual undertaking. This is not always perceptible at first sight, so quickly and simply is the undertaking usually carried out, and so little has the taker to do as compared with the giver. The idea inculcated in our old books is that "delivery" is what constitutes a gift. This is not true. The idea of gift embraces both giver and taker, or two parties meeting together. The very word "gift" is but one-sided in symbolizing the actual transaction. Where the gift is of something beneficial, the law is usually so well satisfied with scrutinizing the giver's acts, that acceptance by the taker will be readily presumed; yet not, we apprehend, against plain evidence to the contrary. It is not uncommon for one to decline a prof-

¹ 2 Bl. Com. 442, 444.

² 2 Kent Com. 438, 449.

³ 1 Pars. Contr. 6th ed. 6; *Sturges v. Crowninshield*, 4 Wheat. 197, *per* Marshall, C. J.; *supra*, p. 58; 2 Steph. Com. 109. The *mutuality* of a contract is expressed in the best of the later legal definitions. For instance, see 1 Pars. Contr. 6th ed. 6: "A contract in legal contemplation is an agreement *between two or more parties* for the doing or not doing of some particular thing."

ferred gift of value from motives of delicacy, self-respect, regard for public opinion, the desire of personal independence as regards the giver, and so on. And if the gift to be made were to one's prejudice, as of a rattlesnake, a deadly poison, or some animal with an infectious disease, acceptance would hardly take place at all. A gift, then, is a contract, according to the best legal definition, and at all events an agreement, because founded in the convention of two or more parties; executed so soon as the proper formalities — substantially a delivery and acceptance — have been complied with; and until then executory from the time the promise to give (if any) was first made or the formalities of execution began. And whether it be executory or executed, the general law of contracts should be invoked to adjust the respective rights and obligations of the parties; the element of consideration always bearing, however, as we have shown, on the question of legally enforcing an executory promise or undertaking.

Toullier and Barbeyrac are cited by Chancellor Kent among writers on the civil law who stand opposed to Puffendorf, in this same discussion, whether a gift is properly a contract; the latter writer having excluded gifts from the class of contracts, out of deference to the Roman lawyers, who restrained the definition of a contract to engagements resulting from negotiation.¹ We should suppose that there might be negotiations for a gift, just as there are negotiations for the care of a chattel without reward; a sort of gratuitous contract being presented in either case as the primary result, while the promise remains executory. And writers, whether of the civil or common law, who class all bailments, whether gratuitous or upon consideration, under the general head of Contracts, and yet refuse a place likewise for gifts, appear to us inconsistent.²

¹ 2 Kent Com. 437; Puff. Droit des Gens, liv. v. c. 3, § 10, n. 5.

² See Story Bailm. § 2; 2 Bl. Com. 446; 2 Kent Com. 558; also, Loan and Hire of Personal Property, *infra*.

As with contracts generally, so is it with a gift: the capacity of the parties and the substantial good faith of the transaction are material to its validity. This rule is universal.¹ Every transfer of property should be made in the exercise of an intelligent understanding and freedom of will suitable to the occasion.

In the first place, there should be sufficient mental capacity. But the law presumes mental competency in every contract, though ready to receive proof to the contrary. The parties who are usually classed as incompetent to make contracts legally binding are married women, infants, and insane persons; and the law imposes some restrictions, besides, for the protection of seamen; while outlaws and aliens were formerly disqualified altogether, on grounds of public policy or expediency, with which we have little concern in this country. The disabilities of married women are rapidly disappearing under the influence of modern legislation and judicial decisions; and even as to infants and insane persons—classes which present every shade of mental incapacity, from mere immaturity of judgment to hopeless idiocy and utter imbecility—the law discriminates; rarely pronouncing a contract absolutely void, unless to the plain prejudice of the incompetent party, sustaining any contract for necessities as plainly intended for his benefit, and leaving doubtful contracts voidable at the option of the incompetent party so soon as he becomes *sui juris*. The appointment of a guardian, by which a sort of representative mental capacity is legally substituted for the incompetent person's ordinary business transactions of life, removes much of the uncertainty otherwise attending such contracts.²

¹ Capacity was regarded in gifts under the Roman law. And a delivery by mistake gave a right to recall the gift. Colquhoun Rom. Law, § 1060.

² See 1 Pars. Contr. 293 *et seq.*; Sch. Dom. Rel., Parts II., IV., V., *passim*.

Now to apply these principles to gifts. It is manifest that a beneficial gift, even to one mentally incapable of contracting, could hardly be void under any circumstances; if voidable, he or his representative would be under the obligation of restoring the property; if consumable and actually consumed, meanwhile, for his benefit, it would most likely have been as valid *per se* as other contracts for necessities, with this very important difference in its favor, that the incompetent person's estate had nothing to pay for it. Quite consistently with this theory, the civil and common law presume acceptance in every beneficial gift; and this, notwithstanding the donee was an infant. But whether such gift might not be set aside afterwards as voidable, at the instance of the infant or his legal representatives, on restoration of the property still unconsumed, the courts do not seem to have had occasion to inquire.¹ It may fairly be inferred that the same presumption of acceptance would apply, and — *mutatis mutandis* — the same general rule in the case of an insane donee.

But the very considerations which prompt the courts to sustain a beneficial gift on an incapable donee's behalf must induce them to break up the transaction, when the donor is the incapable party. For, of all property transfers, a gift should be made in the exercise of a befitting mental capacity, since the giver is to receive no kind of recompense or equivalent. The more beneficial it is to the donee, the less is it to the donor. It is here that mental incapacity would doubtless afford a ready cause for rendering the gift voidable, or indeed for treating it as altogether null and void. At the same time, we should distinguish between gifts of one's whole estate and gifts of specific chattels. A will is frequently set aside for want of what is termed testamentary capacity; that

¹ See *De Levillain v. Evans*, 39 Cal. 120; *Rinker v. Rinker*, 20 Ind. 185; *Gardner v. Merritt*, 32 Md. 78. And see *Sch. Dom. Rel.* 534-536; *Parsons v. Hill*, 8 Mis. 135; *Turpin v. Turpin*, 16 Ohio St. 270.

is, a sound and disposing mind capable of appreciating one's own relation to the proper objects of his bounty, their needs, and the effect of his disposing act. Whether a test of this character might not be applied to a single sweeping act, by way of gift, in disposing of one's estate, should an extreme case arise, we will not inquire; but in the ordinary case of a specific gift, as manifested in a single act accompanied by delivery, the test of mental capacity would be that applicable to any other contract, and not testamentary capacity.¹

In the second place, freedom of will is essential to the validity of a gift, as in other contracts; and where donor or donee has been imposed upon, by fraud or force, or there is palpable error, the party wronged can doubtless have the gift annulled on application to a court of equity.² As to donors, in fact, the rule extends much further. Actual fraud or force practised by the donee need not be shown, nor so great a degree of mental weakness on the donor's part as to amount to legal incapacity to contract or make a will, in order to set aside a gift which has been obtained from the donor by a donee standing in some confidential relation to him; such as that of attorney to client, trustee to *cestui que trust*, guardian to ward, medical or spiritual adviser to advisee or patient. For the presumption is, that where one party is so situated as to be able to exercise a controlling influence over another's person or property, any transaction, which is decidedly to his own advantage and to the other's disadvantage, must have been procured by the exercise of undue influence in accordance with the opportunity. Especially must this be true of a transfer by gift. And hence the rule well established by the authorities is, that gifts obtained by one standing in such confidential relation are *prima facie* void, and the burden

¹ See *Crum v. Thornley*, 47 Ill. 192; *Van Deusen v. Rowley*, 4 Seld. 358. But, as to gifts *causa mortis*, see *post*.

² *Samuel v. Marshall*, 3 Leigh, 567; also *Todd v. Grove*, and other citations in next note.

is thrown on the donee to establish to the satisfaction of the court, that the gift in question was the free, voluntary, unbiased act of the donor.¹ But as the requisite proof for overcoming so unfavorable a presumption is frequently attainable, gifts of this character may be sustained on proper evidence: they are not necessarily and invariably void.²

The character of such a gift — whether trifling or excessive in amount, and reasonably or unreasonably made under the circumstances — is material to the issue. Thus, a gift made to one standing in a confidential relation, of a sum sufficient to make up the latter's due share, under a will of the donor's deceased husband, whose inequalities of disposition the donor desires to correct, is from this point of view sustainable; especially if the other parties interested have been consulted, and given their consent.³ The next material inquiry concerns the influence actually exerted by the donee, whether habitually or on the particular occasion, as tending to bring about the present transfer in his own favor; and here the physical health and mental vigor of the donor at and about the time of the gift, and his susceptibility to influence and importunity, are circumstances for consideration, as well as the character of the influence which the donee seemed disposed to throw around him.⁴ In

¹ *Todd v. Grove*, 33 Md. 188, where the whole subject is ably discussed; 1 Story Eq. Jur. §§ 307–323, and cases cited; *Leddel v. Starr*, 5 C. E. Green (N. J.), 274; *Garvin v. Williams*, 44 Mis. 465; *Wright v. Vanderplank*, 2 Kay & J. 1; *Donnell v. Donnell*, 1 Head, 287; *Yosti v. Laughran*, 49 Mis. 594; *Rhodes v. Bate*, L. R. 1 Ch. 252; *Taylor v. Taylor*, 8 How. 183; *Smith v. Kay*, 7 H. L. 772. As between parent and child, the presumption applies in cases where the parental authority and dominion have not yet terminated; see *Wright v. Vanderplank*, and *Taylor v. Taylor*, *supra*. And for the application of this rule to the several domestic relations, see *Sch. Dom. Rel.* 283, 349, 375, 512.

² *Ib.*; *Nesbit v. Lockman*, 34 N. Y. 167.

³ *Leddel v. Starr*, 5 C. E. Green (N. J.), 274. See *Rhodes v. Bate*, L. R. 1 Ch. 252.

⁴ *Todd v. Grove*, 33 Md. 188.

all gifts of this sort, equity scrutinizes the transaction with jealous care, on grounds of public policy, and will require satisfactory proof of equal and fair dealing.¹

Any kind of personal property, whether corporeal or incorporeal, appears at this day capable of transfer by gift.² But the subject of gift should be certain. Hence a gift of property not *in esse* at the time of the alleged transfer does not take effect.³ And a writing which purports to give to a certain person "all the money of which I shall die possessed," — there being no actual delivery of the money, — is only valid when it can be legally established as a will.⁴ Nor can there be a direct and immediate gift of personalty to persons not in existence.⁵

The modern tendency being plainly to confine the term "gift" to personal property, using such words as "grant," "voluntary conveyance," or "settlement," in preference, where real estate is made the sole subject of transfer, or included, we shall fairly cover the modern law of gifts by placing before the reader such of the court decisions only as come within the proper scope of this work. And, following the civilians in their mode of classification, we shall set forth two lead-

¹ 1 Story Eq. Jur. §§ 307-323. In *Rhodes v. Bate*, L. R. 1 Ch. 252, it is stated that the well-established rule of the English chancery courts is to set aside a gift made to one standing in a confidential relation to the donor, *unless it can be shown that the donee had competent and independent advice*; an exception arising where the gift was of no considerable amount. The American rule seems to be more flexible, and yet a stringent one. See *Todd v. Grove*, *supra*.

² That gift may be made of a chattel real, such as a lease, see *Mahon v. Baker*, 26 Penn. St. 519.

³ 2 Kent Com. 438; *Butler v. Scofield*, 4 J. J. Marsh. 139; *Egerton v. Egerton*, 17 N. J. Eq. 419. But see *Whiting v. Barrett*, 7 Lans. 107.

⁴ *Butler v. Scofield*, 4 J. J. Marsh. 139; *Busby v. Byrd*, 4 Rich. Eq. 9. But see *Hannon v. State*, 9 Gill, 440.

⁵ *Hall v. Thomas*, 3 Strobb. 101.

ing kinds of gifts in order : *first*, gifts *inter vivos*, under which are included the general gift transactions between man and man ; *secondly*, gifts *causa mortis*, which have especial reference to the anticipated death of the giver, and are not to take effect if the peril passes him by.¹ Of the former kind it might be said, that the transfer takes place solely by act of the parties, as in contracts generally ; while in the latter it assumes, in addition to this act of the parties, the actual termination of the transferring owner's natural life, leaving the transferee surviving him, and so presents a case of title somewhat like that of acquisition under a will.

It should be carefully borne in mind, in the course of the present investigation, that the contemplation of approaching death, as an essential element in the title, is that which especially distinguishes a gift *causa mortis* from one *inter vivos* ; for a person may, and not unfrequently does, make an absolute and irrevocable gift while actually on his death-bed, not meaning that the issue of his illness shall affect the transfer at all ; in which case, if his mind were sound and clear, and the intention properly executed, the donation must stand on the footing of any other gift *inter vivos*, as an act of the parties unaffected by the fact of the donor's mortal dissolution soon after.

¹ See 2 Kent Com. 438; Bouv. Dict. "Donation," "Gift;" also the following chapters.

CHAPTER II.

GIFTS *INTER VIVOS* ; HOW EXECUTED.

GIFTS *inter vivos*, or simple gifts, are such as one party makes to another without the expectation of approaching death as the moving cause.¹ And since the mutual intention of the parties to such a gift is properly carried out at once upon delivery and acceptance, or equivalent acts, the transfer will take place absolutely and irrevocably, as the executed act of the parties, upon the due observance of the requisite formalities.

Gifts *inter vivos* are commonly made where the giver is in his ordinary good health. But this need not be ; for, however precarious might be the actual chances of prolonged existence, it is only when death appears imminent, and the prospect of losing for ever his hold upon his property leads the giver to decide that he will bestow a thing in a particular manner, that the law deems the gift he makes other than one *inter vivos*.² All gifts are *inter vivos* except those *causa mortis*.

So long as the gift *inter vivos* remains unexecuted, or rests on a mere executory contract to give, it has no legal validity ; for a simple promise to give is without consideration, and therefore unenforceable. Hence, one's parol promise to pay money as a gift does not bind him ; but he may change his intention and revoke the promise at any time before completing

¹ See 2 Kent Com. 438 ; Bouv. Dict. " Gift." Cf. Gifts *Causa Mortis*, cs. *infra*.

² Irish v. Nutting, 47 Barb. 370 ; Sessions v. Moseley, 4 Cush. 87 ; Allen v. Polereczky, 31 Me. 338 ; Rhodes v. Childs, 64 Penn. St. 18.

the gift.¹ So, too, a parol promise to a trustee, that he shall have the trust property upon the death of the beneficiary, is revocable at pleasure.² And money paid into the hands of B., as trustee or attorney, for the benefit of a third person, is said to be countermandable so long as it remains in B.'s hands.³ In short, the mere intention or naked promise to make a future gift, however worthy may have been the object, is ineffectual to pass the title to the property. Nor can the promisee under these circumstances maintain either a suit at law or a bill in equity to compel a full performance of the contract for his benefit.⁴

But since it is really the want of a consideration that prevents this promise to give from becoming obligatory, the case might sometimes present mutual promises of such a character, or such a detriment sustained by the promisee at the instance of the party promising, as to render the contract enforceable against the latter, on the ground that the transaction, taken as a whole, presented a sufficient legal consideration for compelling performance. On the ground of mutuality, voluntary subscriptions for charitable purposes are sometimes enforced against the several subscribers; for, though each for himself merely promises to give money voluntarily, they are all deemed to have signed relying upon the promises of one another.⁵ But, in ordinary instances, the simple expression of a design, or even the promise, to make a gift for a benevolent object specified, is of no avail, unless the suitable act of transfer follows.⁶

¹ *Pearson v. Pearson*, 7 Johns. 26; *Pitts v. Mangum*, 2 Bailey (S. C.), 588; *Fink v. Cox*, 18 Johns. 145; *Noble v. Smith*, 2 Johns. 52.

² *Lee v. Luther*, 3 W. & M. 519.

³ *Cotteen v. Missing*, 1 Madd. Ch. 176; 1 Dyer, 49 a; 2 Kent Com. 439.

⁴ *Taylor v. Staples*, 8 R. I. 170; *Carpenter v. Dodge*, 20 Vt. 595; *Johnson v. Stevens*, 22 La. Ann. 149; *Antrobus v. Smith*, 12 Ves. 39; *Pennington v. Gittings*, 2 Gill & J. 208.

⁵ *Watkins v. Eames*, 9 Cush. 539; *Mirick v. French*, 2 Gray, 420; *Ives v. Stirling*, 6 Met. 310; 2 Bl. Com. 441, 442.

⁶ *Phelps v. Pond*, 23 N. Y. 69.

Contracts concerning chattels upon consideration should be carefully distinguished from contracts of mere gifts, which they sometimes resemble. Thus, A.'s promise to give a foal to B. if certain services are rendered by the latter, give B. a right to the foal upon performing the stipulations on his part; and this because there is a contract upon consideration, and not a voluntary promise.¹

What acts, then, are essential on the donor's part for completely executing a gift of personal property? Delivery of the property in question, first and foremost, with the corresponding intention to give, must be the answer. And the rule has long been maintained, that the owner must part with his dominion over the property before the gift can take effect: for so long as the gift remains incomplete, inchoate, and imperfect, there exists, it is said, the *locus pœnitentiæ*,—the opportunity for the giver to repent and change his purpose.²

But delivery, in order to effect the transfer, must be, here as elsewhere, according to the subject-matter. One mode of delivery applies to things corporeal; another to things incorporeal. Bulky goods may be delivered by handing a key or other symbol, so as to enable the donee to take possession; while, with articles which readily pass from hand to hand, manual delivery constitutes the appropriate method of transfer. But, whether the possession given be actual or constructive, the donor must have thereby evinced an intention to part with the dominion of the property, as well as its possession.³

Nor is it enough to say, "I give you" a certain thing, and then withhold it; for a verbal gift without actual delivery

¹ Linnendoll v. Doe, 14 Johns. 222.

² 2 Kent Com. 438; Taylor v. Staples, 8 R. I. 170; Cox v. Sprigg, 6 Md. 274.

³ 2 Kent Com. 438, 439; Hawkins v. Blewitt, 2 Esp. 663; Noble v. Smith, 2 Johns. 52; 1 Sch. Pers. Prop. 110.

transfers no title. Any parol declaration of gift will stand upon the footing of a mere promise to give ; and, to complete the transfer, acts and words should harmonize in establishing the gift intent.¹ The circumstances must show that a present gift is intended ; for words of future promise do not change the title.²

Corporeal chattels will, in general, pass by manual delivery.³ And where the articles to be given are numerous, and not easily taken in hand, it may suffice for the donor to point them out generally, and allow the donee to take them.⁴ Intention is to be regarded rather than formal procedure ; and any clear expression of the donor's willingness that the donee shall take the property for his own, will suffice, on his part, when the chattel is present and in a suitable condition for the donee to avail himself of his opportunity.⁵

Where personal property is already in possession of the donee as the donor's bailee or agent, there need be no formal delivery : it is enough for the donee to take or keep actual possession in his new character, and be ready to show that the donor has relinquished all dominion over the chattel in his favor.⁶ Thus, if one has borrowed a book, and the owner afterwards says, "I make you a present of it," the borrower may become the new owner without having ever brought the book back. So is it where the owner of a boat, confined to his bed with sickness, tells the boatman who has had its

¹ *Grangiac v. Arden*, 10 Johns. 293 ; *Wheatley v. Abbott*, 32 Miss. 343 ; *Kidder v. Kidder*, 33 Penn. St. 268 ; *Bourne v. Fosbrooke*, 18 C. B. n. s. 515 ; *Ewing v. Ewing*, 2 Leigh, 337 ; *Sewall v. Glidden*, 1 Ala. 52 ; *Singleton v. Cotton*, 23 Geo. 261. But see *Allen v. Cowan*, 23 N. Y. 502.

² *Shower, v. Pilck*, 4 Ex. 478.

³ *Bogan v. Finlay*, 19 La. Ann. 94.

⁴ *Allen v. Cowan*, 23 N. Y. 502.

⁵ *Ib.* ; *Caldwell v. Wilson*, 2 Speers, 75 ; *Winter v. Winter*, 9 W. R. 747.

⁶ *Winter v. Winter*, 9 W. R. 747 ; *Wing v. Merchant*, 57 Me. 383 ; *Tenbrook v. Brown*, 17 Ind. 410.

charge and custody that he may have it for his own.¹ Conversations and general conduct recognizing the gift, here establish a change of possession; the law dispensing with all idle and useless formalities.

The delivery of a corporeal chattel of the receptacle sort — such as a desk, a box, or a trunk — will pass the chattel with all its contents, if such appears to have been the giver's intention. Thus, the delivery of the key of a chest, with words showing that the donor designed a constructive delivery of the chest and all it contained, would entitle the donee to money, jewelry, and other effects found inside of the chest.² An owner not unfrequently prepares a pleasant surprise in this manner for the object of his bounty. But, since the owner might have designed a gift of the thing apart from its contents, or supposing it empty, or under some misapprehension of what it actually contained, transactions of this character should be carefully scrutinized by the courts; especially if the giver were unable to inspect the property for himself at the time of delivery.

Thus far we have dealt with principles well settled in their application to personal property of the corporeal kind, — chattels whose natural mode of transfer is that of literally changing hands. But how is it with gifts of incorporeal chattels; such as bills, notes, certificates of stock, and other money rights evinced by writing, and requiring other formalities than a manual transfer? It is here that the doctrine of the old common law fails us. No such gifts were contemplated by the early English jurists at all: their maxims were cut to a narrower pattern. Debts anciently were not assignable; hence they could not be the subject of gift. But when bills and notes gained a footing in the courts, delivery of the

¹ *Winter v. Winter*, 9 W. R. 947.

² *Marsh v. Fuller*, 18 N. H. 360; *Allerton v. Lang*, 10 Bosw. (N. Y.) 362; *Penfield v. Thayer*, 2 E. D. Smith (N. Y.), 305; *Cooper v. Burr*, 45 Barb. 9.

writing, with or without indorsement, according to the tenor of the instrument, became the rule of transfer. Later still developed the important doctrine of assignment, whereby a creditor or claimant could pass over his money right for the substantial benefit of another, on delivery of a suitable formal document.¹

If, then, the old essence shall infuse the new substance, the law may still demand, for gifts of incorporeal chattels, such delivery as the nature of the property admits ; for bills and notes, delivery of the paper, with or without indorsement, according to the tenor of the instrument ; for negotiable bonds, corresponding formalities ; for shares of stock, delivery upon a regular transfer ; for chattel mortgages, insurance policies, and money rights generally, a formal assignment, with the document, if there be one ; in all cases treating the gift as inchoate or imperfect, and liable to be recalled, until the giver has handed over the original papers, and completed legal requirements to the last letter.² And in accordance with this view, consistently enough, was the law at first laid down. To use the words of Chancellor Kent : “ If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion, of the property. If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed.”³ Many cases have been decided in conformity with this rule. Thus, it has been held, that a certificate of bank-stock transferable, in terms, at the bank only, personally or by attorney, is not fully bestowed as a

¹ See 1 Sch. Pers. Prop. 95-109 ; also *c. post*, on assignment.

² 1 Sch. Pers. Prop. Part III. cs. 3-13, *passim*, as to the modes of transfer applicable to the various kinds of chattels incorporeal.

³ 2 Kent Com. 439. And see *Dilts v. Stevenson*, 17 N. J. Eq. 407 ; *Phipps v. Hope*, 16 Ohio St. 586 ; *Knott v. Hogan*, 4 Met. (Ky.) 99 ; *Carpenter v. Dodge*, 20 Vt. 595 ; *Taylor v. Staples*, 8 R. I. 170.

gift when delivered indorsed in blank by the donor ; nor, indeed, sufficiently to entitle the donee to a transfer of the stock as against the donor's executor.¹ So, too, a promise, never performed, to execute an assignment, cannot be a gift by assignment.² Nor is a gift of privileges to subscribe to new stock effectual while the scrip is neither issued nor the price payable.³ Delivery of the writing is a prerequisite, of course. And, since the debt represented by a note is the principal thing in a mortgage transaction, while the security is only accessory, the delivery of a mortgage deed, duly assigned, is held to carry no title by way of gift, notwithstanding the giver's intention, unless the note was delivered likewise.⁴

On the other hand, the gift of a note payable to bearer or suitably indorsed, will, doubtless, be good when the instrument is delivered in that condition ; of stock, when the transfer is completed ; of incorporeal chattels, which pass by simple delivery, like bank-notes and lottery-tickets, upon a mere delivery of the thing ; of choses requiring an assignment, upon delivery of the assignment ; in fine, when all has been done which satisfies the legal requirements of transfer, and the intention of making a gift appears to have been fully executed.⁵

• On the principle that a seal imports consideration, a voluntary bond is sustainable, both in equity and at law, as a gift of the money. And presents of sealed notes have been held

¹ *Pennington v. Gittings*, 2 Gill & J. 208. And see *Kidder v. Kidder*, 33 Penn. St. 268; *Buschian v. Hughart*, 28 Ind. 449.

² *Hooper v. Goodwin*, 1 Swanst. 485; *Picot v. Sanderson*, 1 Dev. (N. C.) 309.

³ *Egerton v. Egerton*, 17 N. J. Eq. 419. And see *Moore v. Moore*, L. R. 18 Eq. 474. But see *Stone v. Hackett*, 12 Gray, 227.

⁴ *Wilson v. Carpenter*, 17 Wis. 512. But, as to the technical effect of indorsing part-payment on a mortgage note, see *Green v. Langdon*, 28 Mich. 221.

⁵ See *Wilde, J.*, in *Grover v. Grover*, 24 Pick. 261; *Van Deusen v. Rowley*, 4 Seld. 358; *Bedell v. Carll*, 33 N. Y. 581; *Grangiac v. Arden*, 10 Johns. 293; *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294.

valid in States where the ancient favor is still accorded to specialties over simple writings ; not, however, as gifts, properly speaking, but as valid obligations.¹ The gift of a specialty may also be good in law although the debt which it secures has not been legally transferred.²

Under suitable circumstances, too, the symbolical delivery of an incorporeal chattel might suffice ; as in the case of transferring an attorney's receipt where the instrument is filed in court and out of the owner's custody.³ But, when some other individual is custodian of the instrument, the owner's order of transfer should be acted upon, in order to complete the gift ; for the general rule is to require the utmost delivery of which the thing is actually capable.

But the rule concerning gifts of incorporeal property does not always set so closely. Equitable assignments, as we show elsewhere, are becoming widely recognized in these later days ; and the constant friction of equity upon the common law has already worn down the old, narrow, but uniform, doctrine of chattel transfer too far to leave any sure foothold among the older precedents.⁴ That which would once have failed from imperfect delivery is now frequently upheld as a declaration of trust, or on the consideration that the donor had so far completed his gift that the donee might, as a matter of justice, come into a court of equity and get his title perfected.

There are various instances where a gift *inter vivos* has been latterly supported because of this equitable assignment principle, notwithstanding some actual imperfection in the legal transfer itself. Thus, the delivery, without indorsement or special writing, of negotiable paper payable to the donor's

¹ Mack's Appeal, 68 Penn. St. 231 ; Sherk v. Endress, 3 W. & S. 256, per Gibson, C. J. ; Grover v. Grover, 24 Pick. 261.

² Barton v. Gainer, 3 H. & N. 387 ; Hackney v. Vrooman, 62 Barb. 650.

³ Elam v. Keen, 4 Leigh, 333.

⁴ See *c. post*, as to assignment ; also 1 Sch. Pers. Prop. 97 *et seq.*

own order is upheld in Massachusetts, and some other States, as an intended gift; and the donee may accordingly sue upon the instrument after the donor's death, in the name of his personal representatives.¹ In reply to the objection here urged, that there can be no valid gift of a chose in action *inter vivos*, without writing, it is asserted that a good and effectual equitable assignment of a chose in action may be made by parol, to which courts of law now give full effect. Nor, in this respect, is the distinction between assignments for valuable consideration and assignments without consideration deemed a matter of consequence.² So has a gift of railroad shares been sustained, though assigned in blank and never recorded on the corporation books while the donor was alive.³ In New York, the donee of a bond and mortgage acquires, on the same principle, a legal as well as an equitable title to the securities, by mere delivery of the original papers, without a new writing.⁴ And, in other instances, the new rule has been pushed quite far enough to indicate the judicial disposition to sustain whatever was plainly an intended gift, though unaccompanied by the full solemnities of transfer.⁵

This doctrine of equitable assignment has likewise been successfully invoked in behalf of a donee, to sustain the gift of a savings-bank book which contains entries of deposits to the donor's credit.⁶ For, though the legal title had not been

¹ Grover v. Grover, 24 Pick. 261; Wing v. Merchant, 57 Me. 383; Bates v. Kempton, 7 Gray, 382; Sessions v. Moseley, 7 Gray, 87. And see Snellgrave v. Bailey, 3 Atk. 214.

² Grover v. Grover, *supra*, per Wilde, J.

³ Stone v. Hackett, 12 Gray, 227.

⁴ Hackney v. Vrooman, 62 Barb. 650. This was, however, an extreme case. See Wilson v. Carpenter, 17 Wis. 512.

⁵ Allerton v. Lang, 10 Bosw. (N. Y.) 362; Penfield v. Thayer, 2 E. D. Smith (N. Y.), 305.

⁶ Camp's Appeal, 36 Conn. 83. *Semble*, that in some States the doctrine would not be carried so far. See corresponding cases under Gifts *Causa Mortis*; M'Gonnell v. Murray, 3 Irish Eq. 460; Ashbrook v. Ryon, 2 Bush, 228. But see Tillinghast v. Wheaton, 8 R. I. 356.

completely transferred, the delivery of the book with intent to give the deposits therein represented was here deemed sufficient. Again, the deposit of one's own money in a savings-bank in the name of a donee, the deposit-book evincing the latter's beneficiary interest, and the donor's agreement with the depositary being substantially to the same effect, gives the donee a right to the money, notwithstanding the fact that the donor retains the deposit-book.¹ Here, however, the legal aspect appears somewhat different: for, instead of a delivery without full solemnities, as in the preceding instance, appears a declaration of trust by the donor at the time of the deposit, the donor making himself thenceforward a sort of agent for the donee with reference to the book; the bank itself becoming a trustee, too, for carrying out the donor's purpose. Under circumstances which give such a character to the original deposit, any subsequent deposits made by the donor to the same account will partake of the same quality, and simply increase the fund for the donee's benefit.²

This rule of savings-bank books appears to be well settled in the courts of this country, so far as regards the completion of any gift by deposits made to the account of a designated donee, under circumstances which raise a presumption that the donee had accepted the gift, though he may not have received the deposit-book. For the ordinary books of the bank afford evidence of such a declared trust or equitable assignment, besides the deposit-book itself. But we have here assumed that the deposit was no longer subject to the donor's own drafts. How is it, then, where the deposit is in terms under the donor's full control, and he retains the book besides; as in the familiar instance of a deposit made in the name of a donor as "trustee" or "attorney"? Here the rule

¹ Howard v. Savings Bank, 40 Vt. 597; Blasdel v. Locke, 52 N. H. 238; Gardner v. Merritt, 32 Md. 78.

² Gardner v. Merritt, 32 Md. 78.

is not so clear; and it is doubtful whether such a fund, still practically under the donor's dominion, can be deemed an absolute and perfect gift to any one. Yet, in a recent Connecticut case, the court (not without dissent) decided that a deposit made in the donor's own name, as trustee for a certain neighbor's child (the facts going to show a verbal acceptance, besides, on the donee's part), became a completed gift at the time of deposit, notwithstanding the donee kept the book, and the fund was held subject to her own drafts as trustee without reference to the donee. She had, in fact, drawn for her own use, and, as it would appear, repented of the gift before her death.¹ There must be very little left of the old maxim which insists upon such delivery as the thing is capable of, if deposits like these are available to a donee as an executed gift.

The English courts appear to have less to say than our own of equitable assignments; but, under the same moulding influence of equity, their later decisions frequently uphold gifts which are created by a donor's declaration of trust for the donee. The modern rule, with its limitations, was thus set forth by Lord Chancellor Cranworth in 1865: No doubt any person *sui juris* and *compos mentis* may make a gift by delivery of a chattel; and there is no doubt also that by some decisions — “unfortunate,” he says, “I must think them” — a parol declaration of trust of personalty may be perfectly valid even when voluntary. If I give any chattel, — that, of course, passes by delivery; and if I say, expressly or impliedly, that I constitute myself a trustee of personalty, —

¹ *Minor v. Rogers*, 40 Conn. 512 (Carpenter and Phelps, JJ., diss.). See corresponding cases under Gifts *Causa Mortis*, c. 4, *infra*, for the rule of savings-bank books. Such cases turn somewhat upon the construction of the institution's by-laws; also upon local statutes relative to assignment. In some savings-banks, the book must always be presented with a draft on account; but, in others, the deposits are made subject to the depositor's check, without presentation of the book, as in ordinary banks of deposit.

that is a trust executed, and capable of being enforced without consideration. The authorities turn upon the question, whether what has been said was a declaration of trust or an imperfect gift. "In the latter case, the parties would receive no aid from a court of equity if they claimed as volunteers. But when there has been a declaration of trust, then it will be enforced, whether there has been consideration or not. Therefore, the question in each case is one of fact: Has there been a gift, or not? or has there been a declaration of trust, or not?"¹

To apply this somewhat metaphysical rule. The courts have permitted a complete assignment of personal property to prevail as a gift, notwithstanding a want of notice to trustees, or other acts usually necessary to a complete transfer by assignment; notwithstanding, too, a delivery of the property, such as bills and notes, without their legal indorsement.² Even the simple memorandum of a present gift of incorporeal property, handed over to the donee without delivery of the chattels designated, has been sustained likewise as a declaration of trust; the circumstances showing a present intention to divest ownership in favor of the donee, and the gift being a reasonable one.³ But, where the circumstances have shown no such present intention, a declaration of trust will not be inferred from language and conduct evincing an unsettled purpose, mere playfulness, an intent to postpone delivery, or, at most, a gift imperfectly executed. As in the case before Lord Cranworth, already referred to, where a father had put a check into the hands of a son, nine months old, saying, "I give this to baby, for himself," and then took back the check and put it away; afterwards expressing a similar purpose of giving, and yet

¹ *Per* Cranworth, L. C.; *Jones v. Lock*, L. R. 1 Ch. 25.

² *Kekewich v. Manning*, 1 De G., M. & G. 176; *Richardson v. Richardson*, L. R. 3 Eq. 686. But see *Meek v. Kettlewell*, 1 Hare, 464.

³ *Morgan v. Matteson*, L. R. 10 Eq. 475. And see *Roberts v. Roberts*, 15 W. R. 117.

keeping the check among his own effects, where it was found after his death.¹ Or where one hands over certificates of stock, saying, "These are yours;" for the design of making an immediate gift, as here manifested, is deemed incompatible with the theory of a declaration of trust; and the gift necessarily remains imperfect because the stock was never formally transferred.²

The decisions of American courts concerning gifts are rested sometimes on this same rule of a declared trust,³ though more commonly on that of equitable assignment. There is less difference in practice between these two modern rules than would, from certain *dicta* and wire-drawn distinctions of the courts, appear at first likely; both serving to mark the steady advance of a flexible doctrine, peculiar to equity jurisdiction, which seeks to give effect to one's manifest intention, and secure its specific fulfilment, irrespective of all technical informalities attending the performance. Such delivery as the thing admits of, though our traditionary test, is by no means the sure criterion, in these days, of a gift of incorporeal personalty: less likely is it to prove serviceable in the future, unless the judicial precedents should take an entirely new direction.⁴

Delivery from donor directly to donee is not essential; for some third party will not unfrequently be made the me-

¹ Jones v. Lock, L. R. 1 Ch. 25.

² Moore v. Moore, L. R. 18 Eq. 474. And see Heartley v. Nicholson, L. R. 19 Eq. 233, where it is emphatically declared, but under similar circumstances, that it is not enough that the gift was intended *inter vivos*; for the court will not render that perfect which has been left imperfect, nor convert an imperfect gift into a declaration of trust. But cf. English cases of gift *causa mortis, infra*.

³ See Fulton v. Fulton, 48 Barb. 581.

⁴ On this general subject, see analogous cases of gifts *causa mortis*, c. 4, *infra*. That a gift of incorporeal chattels to an agent already in possession requires no formal surrender and resumption of possession, or transfer, see Wing v. Merchant, 57 Me. 383.

dium of transfer. Hence the rule, that to render a gift *inter vivos* effectual, actual delivery must be made to the donee, or to a third person in trust for him ; in which latter case the circumstances should show a full relinquishment of dominion by donor to trustee for the purposes of the trust.¹ In this sense, one may take a fund for a certain person's benefit ; and when his possession is that of the contemplated donee, to whom he continues accountable for the fund, as agent or trustee, not to the donor, the gift stands complete and irrevocable. Writings to this purport have been sustained in the courts as importing a gift, though drawn up unskillfully.²

One who is already the agent or trustee in charge of certain property for the owner may sometimes be required to hand the property to the donee ; and here the gift becomes complete, when, in pursuance of the donor's instructions, he delivers the property to the donee, or so changes the character of his own possession as to become the donee's agent or trustee. But, until this agent has complied with the order, the property continues that of the donor, and the *locus pœnitentiæ* remains.³ Nor can the agent go beyond the scope of his authority in delivering possession, and so make the gift effectual ; for the principal may repudiate the gift if made otherwise than according to his instructions.⁴ If a formal act is still requisite on the principal's part, or final instructions should follow the preliminary expression of a purpose to give, the agent should postpone delivery. In general, where property is delivered to a third person by the donor, with authority to deliver it to the donee, such custodian is, and continues, the donor's agent until delivery to the donee has been con-

¹ *Minchin v. Merrill*, 2 Edw. Ch. 333; *Neufville v. Thomson*, 3 Edw. Ch. 92.

² *Parker v. Ricks*, 8 Jones L. 447; *Rinker v. Rinker*, 20 Ind. 185; *Blanchard v. Sheldon*, 43 Vt. 512; *Dresser v. Dresser*, 46 Me. 48.

³ *Picot v. Sanderson*, 1 Dev. (N. C.) 309; *Cotteen v. Missing*, 1 Madd. Ch. 176.

⁴ *Berry v. Berry*, 31 Iowa, 415.

summated according to directions; and meantime the donor may revoke his authority, and take the gift back.¹

An agency is revoked by the principal's death: therefore, the agent of one who intends a gift *inter vivos* must have performed what was incumbent upon him to make the transfer complete during the donor's lifetime; otherwise the gift fails, as though the donor himself had failed to make a reasonable delivery.² Nor can a gift *inter vivos* be sustained which contemplates a postponement of delivery by the agent or trustee until the donor's decease; for a gift of personalty made after this fashion must stand, if at all, as a gift *causa mortis*, or else on the footing of a testamentary disposition, with all the formalities of a will.³ Delivery, then, in all cases of ordinary gift, must have been made during the donor's lifetime. But if the gift has been once completed, so as to fully transfer the beneficial interest from donor to donee, in accordance with their mutual intent, and so as to make any third party holding custody the trustee for carrying out the original purposes of the donation, or the donee's agent, the subsequent death of the donor, sooner or later, will leave the gift unimpaired.⁴

In special cases, a court might go still further, though trenching on strange doctrines; as where donor and donee had done all in their power to perfect the gift, and the complete transfer failed through the third party's remissness. A recent English case is in point, where A. gave B. his check for money as a gift *inter vivos*, having sufficient funds on deposit, and B. presented the check to the banker in season. Now, had there been no sufficient funds of A. for paying the check, or had B. failed to present the check before A.'s death,

¹ Shaw, C. J., in *Sessions v. Moseley*, 4 Cush. 87; *People v. Johnson*, 14 Ill. 342.

² *Sessions v. Moseley*, 4 Cush. 87; c. 4, *infra*; *Allen v. Polereczky*, 31 Me. 338; *Phipps v. Hope*, 16 Ohio St. 586.

³ *Craig v. Kittredge*, 46 N. H. 57; *Phipps v. Hope*, 16 Ohio St. 586; *Busby v. Byrd*, 4 Rich. Eq. 9; *Knott v. Hogan*, 4 Met. (Ky.) 99.

⁴ See *Dresser v. Dresser*, 46 Me. 48.

it was admitted that the gift *inter vivos* would have failed for non-completion.¹ But it was held, that, as B. ought not to suffer for the banker's remissness, the latter's refusal to pay until he could ascertain whether the signature was genuine did not deprive B. of the advantages of a completed gift, though A. died pending the delay. And the gift was accordingly sustained.²

Having gone over the oral means of transfer, as concerns the donor, there remains for consideration transfer by a deed of gift. Anciently, real and personal property were transferred with similar formalities ; feoffment, with livery of seisin, conferring title to land by a sort of oral symbolical delivery. But a gift of land by word of mouth would be void at the present day ; for modern legislation, both in England and America, requires a formal written conveyance in every transfer of land. Chattels personal, on the other hand, as we have seen, are still alienable by oral gift and delivery.³ But deeds of gift are sometimes to be found, to say nothing of the voluntary family settlements by which property is so often transferred in the mass.⁴ A deed imports consideration ; and the presence of this implied consideration is said to render a deed of itself sufficient to pass the property in goods.⁵ It would appear, then, that, in the absence of an actual corporeal delivery of the chattel itself, a gift can only be consummated by deed or other instrument under seal ; not, in the latter instance, because the delivery of the deed is a symbolical

¹ *Tate v. Leithead, Kay*, 658; *Jones v. Lock*, L. R. 1 Ch. 25.

² *Bromley v. Brunton*, L. R. 6 Eq. 275. This decision, though just on its general merits, appears to be quite exceptional. It does not even appear certain that the banker was remiss in his duty: he might have been exercising reasonable prudence; for the check was in fact badly written, with an erasure in the signature, and therefore payment was delayed.

³ *Rucker v. Abell*, 8 B. Mon. 566.

⁴ See Sch. Dom. Rel. 276; 1 Sch. Pers. Prop. 162, 165.

⁵ Wms. Pers. Prop. 33, 35; *Carr v. Burdiss*, 1 C. M. & R. 782, 788.

delivery of the property, but on the principle of estoppel.¹ And here there should at least be a suitable delivery of the deed. Its mere execution cannot prevail to establish a donee's title ; since the presumption must be, so long as the donor holds back the instrument, or if he destroys it, besides keeping possession of the goods, that there never was a perfected intention of giving at all.² Deeds of gift are not common in this country, and never were, except in some Southern States, as part of the machinery of a social system now eradicated.³

As every gift *inter vivos* ought to take immediate effect, whether the chattels or a deed of gift, or both, be delivered, any instrument must be invalid as a deed of gift which purports to convey a present interest in the chattels, to take effect hereafter, the possession being expressly reserved to the donor.⁴

An ordinary writing of gift, not under seal, would, we presume, have the effect in most States, as in England, of a parol declaration of gift, agreeably to the usual statute provisions ; and simply furnish more tangible proof than expressions by mere word of mouth that a gift had been perfected, yet nothing conclusive. Parol declarations of gift, without delivery of the chattel, amounted to nothing more at the old law than a promise to give, void for want of consideration ; but in some of the later cases written memoranda are found of considerable importance in establishing such a declaration of

¹ Hillebrant *v.* Brewer, 6 Tex. 45 ; McWillie *v.* Van Vacter, 35 Miss. 428 ; Connor *v.* Trawick, 37 Ala. 289 ; Baxter *v.* Bailey, 8 B. Mon. 336 ; McCutchen *v.* McCutchen, 9 Port. 656.

² Martin *v.* Ramsey, 5 Humph. 349 ; Reid *v.* Butt, 25 Geo. 28 ; Payne *v.* Powell, 5 Bush, 248 ; Blakey *v.* Blakey, 9 Ala. 391. But see Sewall *v.* Glidden, 1 Ala. 52.

³ As to local statutes which formerly required the registry of gifts and other transfers of slaves, see U. S. Eq. Dig. Fraud, IV. (c.). The formalities had especial reference to creditors and other purchasers.

⁴ McWillie *v.* Van Vacter, 35 Miss. 428. As to the effect of an unsigned postscript to a deed of gift, see Martin *v.* Youngblood, 8 Humph. 581.

trust as equity would now be disposed to carry into effect out of regard to the mutual intention of donor and donee.¹

Statutes requiring the observance of certain formalities of gift *inter vivos*, whether with reference to creditors and purchasers only, or to the parties themselves as well, are sometimes found ; such legislation characterizing, however, rather the civil than the common law. Thus, under the civil code of Louisiana, donations *inter vivos* of incorporeal things, including bills and notes, — checks constituting an exception to the rule, — are a nullity, notwithstanding a manual delivery of the muniment of title, unless formally transferred in presence of a notary-public and two witnesses.² And the registration of certain deeds of gift has been a requisite formality under some of our local statutes.

And now, as to the essential acts on the part of the intended donee, to make the chattel transfer complete. Since all gifts are founded in mutual intention, a donor's act must be of itself insufficient to pass the title ; though the burden of the transaction is generally his own, the donee having nothing more to do in most instances than to accept what is offered him. To prove such acceptance, then, acts and conduct, on the donee's part, consistent with assuming the control and dominion, will suffice, without formal expression of his disposition. Less than this even will satisfy our law ; for acceptance of a gift by the donee, where it is for his advantage, is regularly presumed upon delivery, in the absence of evidence to the contrary.³ Infants, both at the civil and common law, have received the benefit of such presumption, and on a principle not incompatible with the general law of contracts, which discriminates between beneficial and non-bene-

¹ See *Morgan v. Matteson*, L. R. 10 Eq. 475 ; *supra*, p. 79.

² *Succession of De Pouilly*, 22 La. Ann. 97.

³ *De Levillain v. Evans*, 39 Cal. 120 ; *Gardner v. Merritt*, 32 Md. 78 ; *Rinker v. Rinker*, 20 Md. 185.

ficial contracts in the case of those not *sui juris*, and, at most, would require an infant to disaffirm and restore the property on reaching majority.¹ And that the courts will carry this presumption strongly for any donee's benefit is illustrated in the recent case of a savings-bank deposit made by A. in B.'s name, where B. died first, and then A., who had kept the bank-book all the while in his possession. It could not be here alleged (said the court), in the absence of other circumstances, that B. had no knowledge of the deposit, and did not accept the gift; for the presumption was that B. had such knowledge, and did accept the gift.² We presume, however, that if donor or donee die before actual acceptance, and the gift be personal, the donation cannot take effect.³

But whatever might be said as to the general presumption, that a formal delivery on the one hand is followed by actual acceptance on the other, it is clear that the gift *inter vivos* must be perfected as a mutual contract, and on the footing of ordinary transactions. For where, under the circumstances, no formal delivery is called for, — as in instances previously noticed, where the donee is already in possession of the property as bailee or agent, — the donee's own subsequent acts and conduct, if not establishing a technical acceptance, should, at all events, be consistent with the intent of completing the gift; and he should exercise a control thenceforth over the property suitable to the new capacity of owner. For if the lender said to the borrower of a book, "You may keep it as a gift," and yet the borrower soon brought it back, any presumption of a gift would be rebutted by evidence going to show a non-acceptance on his part. The general disposition is to give the donee the benefit of all inevitable doubt; presuming the acceptance of a beneficial gift wherever there is no evidence to the contrary. But what is really called for is

¹ See Sch. Dom. Rel. 532, 547, 582.

² Howard v. Savings Bank, 40 Vt. 597.

³ This was the rule of the civil law. Colquhoun Roman Law, § 1060.

such action or course of conduct on his part, whether more or less demonstrative, as may properly correspond to the donor's own acts or conduct. Thus, once more, if the owner made a verbal gift, allowing the donee an opportunity of taking possession, the gift will become perfect, though the thing were not present nor actually delivered at the time, so soon as the donee obtains possession and dominion, unless the donor meanwhile recalls his permission, and revokes the verbal gift, as he has a right to do.¹ And here, it might be said, the burden of the transaction shifts from the donor to the donee, so that the latter is the active, and the former the passive, party ; and, instead of delivery and acceptance, we seem to have rather permission and taking possession.

Under the modern rule, which recognizes gifts by way of equitable assignment or a declaration of trust, it is sometimes incumbent upon the donee to institute proceedings by suit or bill, in order that his title may be legally perfected.² And where a gift is made of personal property in the alternative, — as, for instance, if the owner of two heifers tells A. that he may have as a gift whichever of the two he wants, — there can be no gift, until A. has made his choice, and the transfer is completed accordingly.³ The donee may doubtless accept a gift through his agent or trustee as well as in person ; and whenever such agent or trustee has assumed dominion, with the donor's full knowledge and assent as evinced actively by delivery or passively by permission to take the chattel in question as a gift in such capacity, the transfer to the donee, or for his beneficial enjoyment, becomes at once completed.

Before passing from the subject of perfecting gifts *inter vivos*, it may be useful to inquire what proof is requisite to show an executed gift. In general, it should be observed that the actual intention of the parties to the transaction is

¹ Whiting v. Barrett, 7 Lans. 107.

² *Supra*, pp. 75-80.

³ Brink v. Gould, 7 Lans. 425.

the main issue ; and that whatever in the surrounding circumstances tends to throw light upon this intention should not be disregarded. Mere delivery and acceptance, or permission to take, followed by taking possession, do not *per se* constitute a gift ; for similar formalities might attend a sale or loan ; and as it is much more natural to suppose that an owner means to part with his property temporarily rather than for ever, or for an equivalent rather than gratuitously, the language, the acts, the general conduct and mutual situation of the parties, and perhaps even the reasonableness of the gift in itself (though this last is rarely regarded save in imputed fraud), may all aid in resolving doubts as to the true character of the transaction, and determining whether a gift was or was not in fact intended. That the transaction should be viewed in the full length and breadth of a rational purpose, and not with undue deference to words apart from acts, will appear from a passage which has been handed down from one of the ancient books, hardly comprehensive enough to be called a maxim, but suitable for illustration ; namely, that if a man intending to give a jewel¹ to another say to him, “ Here I give you my *ring* with the ruby in it,” &c., and with his own hand delivers it to the party, this will be a good gift, notwithstanding the gift bear any other jewel, being delivered by the party himself to the person to whom it is given.² For the giver’s act showed what he meant, notwithstanding the *lapsus linguæ*. And since intention is to be gathered from all the circumstances, the question of gift or no gift is usually left to the jury to be determined according to the evidence presented.³

Among the circumstances favorable to sustaining a transfer as a gift are these : Near relationship between the parties ;

¹ Or rather, we should say, a certain jewelled ring.

² Bac. Max. 87 ; Bouv. Dict. “ Gift.”

³ Boudreau v. Boudreau, 45 Ill. 480 ; Moore v. Gwyn, 4 Ired. 275 ; Carradine v. Collins, 7 S. & M. 428 ; Hackney v. Vrooman, 62 Barb. 650 ; Thomas v. Degraffenreid, 17 Ala. 602 ; Nichols v. Edwards, 16 Pick. 62.

particularly as to transfers from parent to child.¹ Strong affection of the donor for the donee, and especially if the latter had rendered some service, and the gift was a proper mark of gratitude.² The marriage of a daughter, whether the transfer be with special reference to the wedding, or to enable the wedded pair to set up housekeeping.³ Leaving the property in one's possession for a long time, without demanding its return or an equivalent.⁴ Declarations of intention to give, before the donee had possession.⁵ So, too, as corroborative evidence, the donor's subsequent admissions, expressions, and general conduct.⁶ Acts of dominion over the property exercised by the donee with the donor's manifest assent; such as cutting off coupons from bonds in the donee's custody, and regularly appropriating them. And, in general, the enjoyment of income by the claimant with the donor's approval.⁷ In some of the cases, too, may be traced a judicial partiality, perhaps not readily avowed, in favor of gifts as between the donee and the donor's creditors, over gifts in dispute between donor and donee.⁸

On the other hand, such circumstances as the following are deemed unfavorable: Possession of the property by one who occupied some confidential relation to the owner, and had special means of access to it, without at least some more direct proof of a gift.⁹ Giving some writing back in the

¹ *Smith v. Montgomery*, 5 Monr. 502; *Hepworth v. Hepworth*, L. R. 11 Eq. 10.

² *Rhodes v. Childs*, 64 Penn. St. 18.

³ *Betts v. Francis*, 30 N. J. Law, 152; *Carter v. Buchanan*, 9 Geo. 539; *Nichols v. Edwards*, 16 Pick. 62.

⁴ *Carter v. Buchanan*, 9 Geo. 539; *M'Donald v. Crockett*, 2 McC. Ch. 130.

⁵ *M'Cluney v. Lockhart*, 1 Bailey, 117; *Rhodes v. Childs*, 64 Penn. St. 18.

⁶ *Dean v. Dean*, 43 Vt. 337; *Burney v. Ball*, 24 Geo. 505.

⁷ *Bland v. Macculloch*, 9 W. R. 65.

⁸ See *Schouler Dom. Rel.* 231; *Martrick v. Linfield*, 21 Pick. 325.

⁹ *Grey v. Grey*, 47 N. Y. 552; *Prickett v. Prickett*, 20 N. J. Eq. 478.

nature of an obligation to pay, or to return, on receiving the property.¹ The owner's previous declarations and acts inconsistent with the purpose of giving.² Not even the favor with which gifts from father to his marrying daughter are usually regarded can so prevail against proof of intention as to turn that into a gift which was manifestly designed as a loan or sale. It is to be observed, however, that while one's declarations before consummating a gift, in reference thereto, are under the general rules of evidence deemed corroborative testimony in connection with declarations at and about the time of delivery, as part of the *res gestæ*, a donor's declarations after the gift has been executed, for the purpose of affecting the transfer, or explaining what was meant, are not favored when they tend to disparage the donee's title.³

If the evidence relied upon to establish a gift be the delivery of a deed of gift, the written instrument explains itself, and parol evidence is not, on the usual principle, admissible to show an intent on the donor's part different from that which is manifested by the writing.⁴

A gift transaction is sometimes sustained on the ground of the forgiveness or discharge of a debt. Here the surrender of the note, or other evidence of debt; or, if there had been no such writing given, some instrument of discharge, or a receipt in full from the creditor, — would seem to be the usual and proper means of evincing the act of donation. Indeed, the rule has long been that no merely oral declaration will transform a debt into a gift.⁵ But, where one has delivered personal property under circumstances rendering it uncertain whether it was loaned or given, his subsequent distinct dec-

¹ Roland v. Schrack, 29 Penn. St. 125.

² Ib.; Miller v. Eastman, 11 Ala. 609; Rich v. Mobley, 33 Geo. 85; Nichols v. Edwards, 16 Pick. 62.

³ See Gillespie v. Burleson, 28 Ala. 551.

⁴ Pooser v. Tyler, 1 McCord Ch. 18.

⁵ Brinckerhoff v. Lawrence, 2 Sandf. Ch. 400; Strong v. Bird, L. R. 18 Eq. 315; Plummer v. Rundlett, 42 Me. 365.

laration that he meant it as a gift, is admissible to resolve the doubt.¹ And, in any event, the question should be one of intention, to be determined according to the particular circumstances. Thus, where the creditor receives one dollar from the debtor on an account, and balances the account by an entry, "Gift to balance account," and likewise gives the debtor a receipt for one dollar in full to balance all book accounts, this transaction is good as a gift, though it might not stand as an accord and satisfaction.² A gift *pro tanto* may arise from the indorsement of part payments on a note due, with the intent of forgiving so much.³ And, according to the technical rule of the common law, the creditor's appointment of a debtor as the executor of his will, will operate, when duly carried into effect on the creditor's death, as a release or gift of the debt.⁴

On the other hand, an actual gift is not to be construed into a sale or loan, because of the use of such expressions as "for value received" in the writing of transfer; for an actual gift stands on its own merits, notwithstanding any formal expressions resorted to for the purpose of giving effect to the mutual intention of the parties.⁵

To convert a loan into a gift, or finally effect a gift *inter vivos* by some roundabout process, the facts should show that the original intent of the parties, inconsistent with the idea of giving, was superseded by a new and consistent gift intent, with a suitable transfer accordingly. Thus, where one loans money, taking back a note, and afterwards intends to give back the note, but dies without doing so, leaving the arrangement incomplete, and the case is not one of a declared trust

¹ Doty v. Wilson, 47 N. Y. 580.

² Gray v. Barton, 55 N.Y. 68. And see Strong v. Bird, L. R. 18 Eq. 315.

³ Green v. Langdon, 28 Mich. 221.

⁴ Strong v. Bird, L. R. 18 Eq. 315.

⁵ Van Deusen v. Rowley, 4 Seld. 358. But see *supra*, p. 90.

or equitable assignment, there can be no valid gift, for there is no gift between the parties properly executed.¹

Finally, it may be observed that, as each party to a contract has the right to place a natural and reasonable interpretation upon the other's acts and words, no mental reservation can be permitted on either side, to the evasion of rights acquired under the contract in good faith. Not even a donor can defeat the true purpose of his transfer to the donee's prejudice. If the circumstances attending the transfer were such as ordinarily accompany a gift of the sort, thereby inducing the donee to take and accept, in the belief that a gift to him was intended, the title to the property will pass, even though the donor had secretly intended not to make a gift.²

The law as to the execution of gifts *inter vivos*, or ordinary gifts of personal property, may be thus summed up: Such gifts are incomplete and ineffectual so long as they rest in the donor's unfulfilled intention, or mere promise, to give in the future: and promises of this kind are usually, though not invariably, without legal consideration; in which case they cannot be enforced in law or equity. But when the present intention to give has once manifested itself in acts, words, and conduct, amounting, on the donor's part, to delivery, or a permission to assume dominion, as the case may be, and, on the part of the donee, to acceptance, or some other corresponding assumption of dominion, the gift becomes complete, and fully executed. Full delivery, or at least a full transfer, according to the subject-matter, has been the usual requisite of such gifts; but under the influence of modern equity rules, applicable more especially to incorporeal chattels, a transfer without full formalities, but with the present intent to give,

¹ *Henderson v. Henderson*, 21 Mis. 379.

² See *Betts v. Francis*, 1 Vroom (N. J.), 152, *per* Whelpley, C. J.

or even a simple declaration of trust for the donee, has in numerous instances been supported as a gift so completely executed as to enable the donee to have his title and beneficial enjoyment perfected. Gifts may be executed through the medium of trustees or agents, as well as by donor or donee in person, and on the usual principles. Deeds of gift, too, with suitable formalities, sometimes operate by way of estoppel. And whether a full transfer has actually been made in any case, and, if so, whether it were by way of gift or not, is a question of mutual intent, to be determined according to words, acts, general conduct, and the surrounding circumstances.

CHAPTER III.

GIFTS INTER VIVOS; EFFECT OF EXECUTION: QUALIFIED GIFTS.-

I. WE have seen by what formalities gifts *inter vivos*, or general gifts, are fully perfected. And now as to their effect when completely executed. This subject is to be viewed in two aspects: *first*, as concerns the parties themselves; *second*, as concerns third persons.

First, as concerns the parties themselves. A gift fully performed, being in effect an executed contract, which carries the property with full right and title, it follows, as a rule, that neither donor nor donee can revoke it without the other's consent. The language of the courts and text-writers is clear on this point, though usually open to criticism in ignoring the donee's *status*. Thus says Blackstone of an executed gift: "It is not in the donor's power to retract it, though he did it without any consideration or recompense."¹ The rule of equity is the same,—that a voluntary gift, though it be to trustees instead of directly to the beneficiary, will be regarded as valid when fully executed, and its provisions will be enforced and carried into effect against the parties themselves and their representatives.² In general, it may be said of gifts *inter vivos*, in the language of an American court: "A gift is no more revocable in its nature than a conveyance or transfer of property in other modes. The possession being

¹ 2 Bl. Com. 441. And see 2 Kent Com. 442; *Faxon v. Durant*, 9 Met. 339.

² *Stone v. Hackett*, 12 Gray, 227; *Sanborn v. Goodhue*, 8 Fost. 48.

given with the intent to part with the property in the thing, the right of dominion for all purposes goes with it.”¹

An executed gift of personal property, *inter vivos*, is not then revoked or annulled by one's subsequent declarations that no gift was intended.² Nor by any subsequent will or codicil of the donor, which purports to dispose of the same property ; and this even though the effect of the gift were to deprive the donor's wife of her full share in his property after his decease.³ And it makes no difference that the property given was already bequeathed otherwise in the donor's will ; since one's will is revocable at pleasure while he lives, and its execution does not debar him from exercising afterwards the usual rights of transfer.⁴ Nor, it is held, can the person assured annul an executed gift of his life-insurance policy, by having it cancelled, without the knowledge and consent of the beneficiary, and another policy substituted payable to a different party, in consideration of such cancelled policy ; but the result will be to give the former donee an equitable right to the benefit of the new policy.⁵ Furthermore, as a gift is not revocable *in toto*, after once taking full effect, neither can a party revoke it in part ; for it is not in his power to diminish what has once been given and accepted.⁶

¹ *Parker v. Ricks*, 8 Jones L. 447.

² *M'Kane v. Bonner*, 1 Bailey, 113 ; *High v. Stainback*, 1 Stew. 24.

³ *Marston v. Marston*, 1 Fost. 491 ; *Sanborn v. Goodhue*, 8 Fost. 48.

⁴ *Parker v. Ricks*, 8 Jones L. 447.

⁵ *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 294. Here the former policy was taken out for the benefit of a party to whom the assured was engaged, and was placed in the hands of the donee's depository ; and the assured party afterwards got possession of the instrument surreptitiously, and procured cancellation as above. It might be questionable how far any life-insurance policy may be deemed an executed gift at all during the life of the assured, especially if yearly premiums are payable ; how far, too, one may make a present of such risks by way of pure gratuity.

⁶ *Minor v. Rogers*, 40 Conn. 512. Two judges dissented from the opinion delivered in this case ; not, we presume, because of any doubt on this point, but because, under all the circumstances, it was questionable whether the gift had ever been fully executed at all. See reference *supra*, p. 78.

All this accords with the general rule, that the subsequent words, acts, and general conduct of either party to a contract which has once been executed cannot avail to the prejudice of the other party's rights thereunder.

Controversies of this sort frequently arise after the donor's death. And the considerations which applied to the party himself apply likewise to his legal representatives and those who claim the benefits of transmission by his death, as a surviving husband, widow, or kindred; they cannot revoke the gift once completely executed. Hence the property donated forms no part of the deceased donor's estate, and his executor or administrator cannot intermeddle with it, unless, perchance, the donor died insolvent.¹ Thus, where a deposit has been made with a banker, so as to constitute a complete gift, and both donor and donee have since deceased, the banker is not bound to pay the sum over to the donor's representatives, but rather to those of the donee.² Again, supposing the gift of a note payable to order is treated as sufficiently executed on delivery and acceptance of the note without indorsement, it follows that the donee may not only sue upon it, in the donor's own name while he lives, but, after the donor's death, bring his action in the name of the executor or administrator, even though it be, as a matter of fact, against such representative's express consent.³ And where a gift had been executed to trustees, to be managed as their own for a certain purpose, they were permitted to retain the property, as against the donor's executor, upon giving bond to execute the trust.⁴ Some cases, on the principle of an equitable assignment, go so far as to require the personal

¹ Van Deusen v. Rowley, 4 Seld. 358; Gilleland v. Failing, 5 Den. 308; Stone v. Hackett, 12 Gray, 227; Gardner v. Merritt, 32 Md. 78; Jewell v. Porter, 11 Fost. 34; Marsh v. Fuller, 18 N. H. 360; Barton v. Gainer, 3 H. & N. 387. For the exceptions of insolvency, see *infra*.

² Howard v. Savings Bank, 40 Vt. 597.

³ Grover v. Grover, 24 Pick. 261; Bates v. Kempton, 7 Gray, 382.

⁴ Dresser v. Dresser, 46 Me. 48.

representative to complete the final formalities of a transfer of incorporeal property which the donor had left unfinished.¹

But the delivery of property by one's executor or administrator, under a mistaken supposition that it had been conferred by gift before the donor's decease, will not estop him from suing to recover it again for the benefit of the estate.²

The mental incapacity of a party to the gift may be, however, under the circumstances, a suitable reason for declaring the gift null and void; and so, too, may a gift be set aside, on the ground of fraud or force, at the instance of the party who was entrapped into the transaction. These exceptions, which are found chiefly available to a donor, have already been set forth in detail.³

Still another course is always open to the parties, provided they can agree to it; namely, to rescind or modify the gift by mutual consent. This is a general characteristic of all transfers by contract,—they may be opened for adjustment and readjustment at pleasure; but with this express limitation, that all whose rights have once vested concur in the change. Accordingly, where A. makes a gift to B., A. and B. may afterwards agree to rescind the gift; but where A. completes a gift to B., for the benefit of C., it does not lie in the power of A. and B. to change the effect of the transaction without C.'s assent.⁴

Any new contract made by the parties, with reference to property once given, is to be construed according to its true intent and purpose; and hence a gift of a chattel is not annulled where the donee gives it back to the donor on some special bailment or trust; as, for instance, to collect what is

¹ Allerton v. Lang, 10 Bosw. (N. Y.) 362.

² Phipps v. Hope, 16 Ohio St. 586. As to the right of a deceased donor's representative to impeach for fraud, see Hunt v. Butterworth, 21 Tex. 133.

³ See c. 1, *supra*, p. 63. And see 2 Bl. Com. 441; 2 Kent Com. 440.

⁴ Plummer v. Rundlett, 42 Me. 365.

due, if the property be of an incorporeal sort, or generally to keep it until the donee shall call for it.¹

We have seen that a beneficial gift, even to an infant, is presumed to have been accepted by the latter. And that parents can make gifts to their children, there is no doubt whatever. Gifts of this character, then, should constitute no exception to the general rule which excludes the donor's right to revoke at pleasure. And hence it is held, as between parent and child, that, where a father presents an article of dress or ornament, — such as a watch to his young son, — he cannot afterwards reclaim the gift without the son's consent.² And in the case of a piano given in good faith to one's daughter, fourteen years of age, the gift has been supported against the father's creditors, there being no fraud upon them in legal contemplation.³

But, from the language used in some cases, it would appear, that, out of deference to the right of parental control, the parental gift to one's minor child might be treated as capable of resumption by the giver; the more so, if the child's subsequent conduct proved undutiful and ungrateful.⁴ This last seems to us an illogical view of the subject; and the better opinion must be, in the light of English and American authorities, that the child's right fails only where no gift was purposed, or where under the circumstances the intended parental gift failed of a suitable delivery and acceptance. But, when the child lives under the parental roof, a transfer of the property to be held under the child's sole and exclusive possession, free of all parental control, cannot always be safely inferred; the fact being, doubtless, that a parent often clothes, feeds,

¹ *Grover v. Grover*, 24 Pick. 261.

² *Smith v. Smith*, 7 C. & P. 401.

³ *Pierson v. Heisey*, 19 Iowa, 114.

⁴ *Cranz v. Kroger*, 22 Ill. 74; *Johnson v. Stevens*, 22 La. Ann. 144; *Stovall v. Johnson*, 17 Ala. 14. See Sch. Dom. Rel. 349.

and furnishes articles for his children's comfort without designing to confer an absolute gift at all.¹

In respect to revocation, as concerned the parties, the civil law differed from our own. For the Code of Justinian and that of some modern nations of Continental Europe have expressly permitted the revocation of a gift for ingratitude in the donee; if, as in the instances especially commented upon, the receiver should grievously defame the donor, or lay violent hands upon him, or injure his estate, or lay in wait to take away his life. But the right of revocation for these and analogous causes has been treated as personal to the donor: if he forgive the injury, the gift still prevails; and, at all events, his heirs have no such right of action, nor can they set up ingratitude to themselves as a cause of revocation.² Other special causes for revoking a gift are enumerated in the Civil Code. Thus, the unexpected birth of a child to the donor, subsequently to the gift; this seemingly, however, on the ground of a presumed condition at the outset.³ And again, where the gift is so large as to bring the giver to indigence if carried into effect; a feature which is found preserved in the Louisiana Code.⁴

Second. As concerns third persons, an executed gift of personal property may be in general pronounced conclusive.

¹ It is said, in *Pierson v. Heisey*, *supra*: "While a father must be just before he is generous, he may make a valid gift to his child, and if made in good faith, if possession of the property shall be taken by the child, it is held as exclusively hers, and under her sole and exclusive control. It will not become liable to the father's debts subsequently contracted by the simple fact that it was kept in his house with his other furniture." But this favorable rule was asserted in a case where property was claimed by a subsequent attaching creditor of the father. In a suit between parent and child, on the other hand, the rule must be applied with great delicacy. And see *Jones v. Lock*, L. R. 1 Ch. 25, where the court was evidently reluctant to sustain the gift of a large sum of money to a baby, on scanty evidence of the parent's intention to execute it.

² See Colquhoun Roman Law, § 1065.

³ *Ib.*; Code, Lib. 8, 56.

⁴ *Ib.*; Lagrange *v. Barré*, 11 Rob. La. 302; 2 Kent Com. 440.

The sole exception commonly made in the books is in favor of creditors of the donor whose rights are thereby prejudiced.¹ But others whose rights may have been prejudiced deserve a passing notice. Thus, stolen goods — property, in fact, to which the giver has no transmissible title — cannot be the subject of a valid gift as concerns the true owner.² And *bona fide* purchasers are to be respected. Upon common-law principles any voluntary conveyance of personal property is void as against any subsequent *bona fide* purchaser without notice; a doctrine which will be found clearly embodied in most of the American statutes concerning fraudulent conveyances.³ But, if such subsequent purchaser had notice of the previous transfer and yet completed his purchase, he cannot disturb the donee's rights.⁴ The English policy is similar to our own: for the act of 27 Eliz. c. 4, which was passed not long after the famous statute against fraudulent conveyances, distinctly avoids all conveyances of land made with the intent to defraud purchasers; a provision which would doubtless have extended to chattels, had such property been deemed at that day of sufficient consequence.⁵

So long as the formalities of corporeal delivery were pursued to the letter in order that any gift might take full effect, a careful man was not easily entrapped into a subsequent purchase from the donor. But now that the rule of delivery has become so greatly relaxed, instances may more readily occur. And wherever a deed of gift requiring registry is the recognized symbol of corporeal delivery; or if, as in the case of a ship or a mortgage, similar formalities are regularly prescribed out of regard to the specific nature of the property, —

¹ 2 Bl. Com. 441; 2 Kent Com. 440.

² *Supra*, p. 20.

³ *Anderson v. Green*, 7 J. J. Marsh. 448; *Black v. Thornton*, 31 Geo. 641.

⁴ *Ib.*; *Chaffin v. Kimball*, 23 Ill. 36; *Aiken v. Bruen*, 21 Ind. 137; *Gregory v. Haworth*, 25 Cal. 653.

⁵ 4 Kent Com. 463; Sch. Dom. Rel. 280; *infra*, p. 102.

then it would appear that a gift might be made, without registry, so completely executed as to carry the title to the donee, and yet so incompletely that the transaction might be impeached by a subsequent purchaser from the donor who had not that actual or constructive notice which the law requires.¹

But the long-recognized exception to the validity of executed gifts of chattels has been that made in favor of the donor's creditors, whose right to have the transfer set aside wholly or in part, on the ground of prejudice to themselves, we proceed to consider at more length.

The broad ground on which a creditor seeks to reopen transactions of this character is that of fraud. And under the general head of fraudulent conveyances may be classed all conveyances, whether of real or personal property, whose object, tendency, or effect is to defraud one of his legal rights. The decisions which relate to this subject are very numerous and quite conflicting: chiefly, perhaps, for the reason that various minds seeking to enforce the rule of common honesty will yet differ in their views of what constitutes an essentially honest transaction; an inquiry which must in every case depend more upon the bearing of special facts than arbitrary rules.

English legislation recognized at a very early period the injustice of permitting gifts and grants to prevail to the injury of a grantor's or donor's creditors. Soon after the ecclesiastics had introduced into England the Roman law of uses, debtors who were heavily involved began to give lands and chattels to their friends by collusion, in trust, to have the

¹ See Sch. Pers. Prop. 390, 542, as to the registry requirements in the case of ships and mortgages; also cases *supra*. In *Black v. Thornton*, 31 Geo. 641, it is stated, that, as a general principle, a party who claims title to property by deed of gift is a volunteer; and a subsequent purchaser for a valuable consideration, without notice of the voluntary conveyance, is preferred in law to the volunteer; but, if he had notice before he purchased, the volunteer will be preferred over him.

profits at their will, and would then flee to privileged places, forcing their creditors to unfavorable terms of settlement. To stop this growing evil the statutes of 50 Edw. III. c. 6, and 3 Henry VII. c. 4, were enacted, which declare void all fraudulent gifts of goods and chattels made in trust for the donor, and with intent to defraud creditors.¹ Most likely it became uncertain what was the real meaning of statutes which seemed so comprehensive, or else there was found a lack of vigor in enforcing them; for at length came the statute of 13 Eliz. c. 5, which is at the basis of our modern legislation on the whole subject. By this carefully drawn statute all gifts of goods and chattels, as well as conveyances of land, by writing or otherwise, made with intent to delay, hinder, and defraud creditors, are rendered void as against the persons so prejudiced, notwithstanding any pretended consideration for the transfer between the parties. But estates and interests in lands or chattels lawfully conveyed or assured upon good consideration and *bona fide*, without notice of fraud or collusion, are expressly excepted from its operation.²

The statute 13 Eliz. c. 5 (which was extended to Ireland in the reign of Charles I.), has been in substance re-enacted in most of the United States; perhaps in language which smacks less of the conveyancer, and yet with a design to carry out the same ultimate results. In other States it might be claimed as part of the common law brought over by the early colonists. And there are States, like New York, whose legislation expressly favors purchasers in good faith as well as creditors having rights prejudiced by the transfer, supplying other needful checks upon fraud likewise.³

All of this legislation is founded in common reason; and

¹ 2 Reeves Hist. 143.

² 2 Kent Com. 440; Bump Fraud. Conv. Appx., which gives all these statutes at length.

³ *Ib.*

since fraud is a cause for the avoidance of transactions independently of all legislation, on general principles of jurisprudence, it might be said that these modern statutes are little more than declaratory of the common law.¹ The general object is to do justice, and the interpretation should be liberal, not literal. The precedents, already immense in number, covering other transactions than gifts, and embracing real as well as personal property, need not be here reviewed; moreover, the want of uniformity in the legislation of our States on this subject, as touching rights and remedies, besides the want of a sure test for honest transactions, must present obstacles almost insuperable to their exact legal classification.

It may be said, however, that gifts to strangers, and gifts to one's own wife and children not founded upon the consideration of marriage, stand alike subject to the creditor's right of avoidance; since the claims of justice should precede those of affection.² The fraud which vitiates must be directed against lawful creditors, not those who are without a *status* in the courts, nor the general public; but the creditors' demand need not yet be due, so long as the claim is a lawful one and not illegal or pretended; and the statute language will, besides, suffice to bring in others than technical creditors who have suffered injury.³

Whether the statute of 13 Eliz. extends to choses in action, so called, and other kinds of incorporeal property, has been in dispute. The language of this act makes express reference to "goods and chattels;" a term certainly comprehensive enough, in the modern sense, to include the several species which have come into existence since the act was passed,

¹ *Twyne's Case*, 3 Co. 80; *Clements v. Moore*, 6 Wall. 299; *Bump Fraud. Conv.* 58 and Appx.

² 2 Kent Com. 441, 442; Sch. Dom. Rel. 279; *Caswell v. Hill*, 47 N. H. 407.

³ See *Bump Fraud. Conv.* 65, 484, 485; *Feigley v. Feigley*, 7 Md. 537; *Griffin v. Stoddard*, 12 Ala. 783.

though not at that day looked for. But some of the early writers denied the application of the statute to such property as a creditor could not reach by legal process ; the consequence being that a voluntary settlement of choses in action, stock, and the like, might stand against creditors even if made by an insolvent debtor, inasmuch as that species of property could not be taken on legal execution for the payment of debts.¹ In this country the rule is not positively settled, but most of the later statutes against fraudulent conveyances make express mention of "choses in action."² The question is one which relates to the remedy as affected by the character of the property ; and, wherever local practice permits incorporeal chattels to be reached by legal attachment or execution, the creditors' right to impeach the transfer of such chattels ought to prevail.³ In the United States, the tendency of legislation is to extend the usual legal remedies to incorporeal chattels ; and the example of New York is followed by many other States, in giving jurisdiction to the courts of equity, by a proceeding somewhat in the nature of a "creditor's bill," to lay hold of things in action, property held in trust, and equitable interests generally, after the legal remedies have been exhausted.⁴ Even on the general principle of enforcing justice and suppressing wrong, equity might well set aside fraudulent transfers of incorporeal property not liable to legal process ; but, though some American courts favorably incline to this

¹ 2 Kent Com. 442. The question does not arise concerning leases, which are expressly named in the statute.

² 2 Kent Com. 443, *n.* ; Tappan *v.* Evans, 11 N. H. 311 ; Spader *v.* Davis, 20 Johns. 450 ; *contra*, Donovan *v.* Finn, 1 Hopk. 59 ; Statutes of New York, Indiana, Wisconsin, Michigan, Missouri, &c., cited in Bump Fraud. Conv. Appx.

³ Freeman *v.* Pope, L. R. 5 Ch. 538 ; Warden *v.* Jones, 2 D. & J. 76 ; Pinkerton *v.* Railroad, 42 N. H. 424 ; Bump Fraud. Conv. 264 ; Cook *v.* Johnson, 1 Beasl. 51.

⁴ Statutes of New York, Ohio, Kentucky, Michigan, Georgia, Pennsylvania, and other States noted, 2 Kent Com. 443, *n.*

opinion, the English courts appear to have settled down into the strict rule of leaving creditors free to disturb only transfers of property which might be taken in execution for the payment of debts.¹

The rule has been often declared, that a fraudulent purpose must be shared by both grantor and grantee to make a conveyance of property fraudulent as to creditors.² This doctrine, if applied to all transactions irrespective of consideration, would make a gift unimpeachable unless both donor and donee had participated in the fraud. No such favor extends, however, to these gratuitous transfers; for a voluntary conveyance without consideration is held to be void against defrauded creditors, though the grantee were not privy to the fraud.³

Fraudulent intent relates, of course, to the time of the transfer, not to a subsequent period. This plain rule is sometimes lost sight of by creditors who attack a gift or voluntary settlement because of the donor's or settlor's insolvency. But in practice there is found some obscurity in cases where embarrassment and inability to pay actually existed when the settlement was made, but utter and notorious insolvency did not follow until some time later.⁴

¹ *Ib.*; *McMechen v. Marman*, 8 Gill & J. 58; *Chittenden v. Brewster*, 2 Wall. 191; *Abbott v. Tenney*, 18 N. H. 109; *Green v. Tatum*, 4 C. E. Green, 105; *contra*, *Pool v. Glover*, 2 Ire. 129; *Scott v. Scholey*, 8 East, 467; *Otley v. Lines*, 7 Price, 274; *Mathews v. Feaver*, 1 Cox, 278; *Crozier v. Young*, 3 Mon. 157; *Bump Fraud. Cony.* 269, 510, 514.

² *Partelo v. Harris*, 26 Conn. 480; *Leach v. Francis*, 41 Vt. 670; *Foster v. Hall*, 12 Pick. 89; *Steele v. Ward*, 25 Iowa, 535; *Splawn v. Martin*, 17 Ark. 146; *Brown v. Foree*, 7 B. Mon. 357; *Weisiger v. Chisholm*, 28 Tex. 780.

³ *Clark v. Depew*, 25 Penn. St. 509; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Marden v. Babcock*, 2 Met. 99.

⁴ *Leavitt v. Leavitt*, 47 N. H. 329. See *Mackay v. Douglas*, L. R. 14 Eq. 106; *Parish v. Murphree*, 13 How. 92; *Phillips v. Wooster*, 36 N. Y. 412.

In applying the statutes against fraudulent conveyances, much stress has been laid on what are called badges of fraud, among which that of retaining possession of personal property which has been nominally transferred is, perhaps, the most important. Possession raises the presumption of ownership, especially in the case of corporeal chattels; and hence the continued possession of a transferring owner, with its incidental advantage of business credit, is presumptive evidence in a creditor's favor that the transfer was fraudulent and a mere sham. But such possession is not, according to the later and better authorities, conclusively fraudulent, though the cases are somewhat conflicting; and it is now held competent in most sale transactions to show that the transfer was made in good faith, and that there were good reasons for leaving the property afterward in the original owner's hands.¹ But, in the case of a gift,—a mode of transfer altogether gratuitous, which usually requires delivery and acceptance in the first place,—it would be almost impossible to rebut the unfavorable presumption of a donor's fraudulent intention, where he was found in possession at or soon after the alleged transfer.²

Fraud is a question of fact, to be inferred from the facts attending the particular transaction; and whether the intent to hinder, delay, and defraud, under statutes against fraudulent conveyances, has actually existed, must usually be open to free inquiry. But judicial investigation is aided by certain presumptions which the law has applied, with more or less

¹ See *Bullis v. Borden*, 21 Wis. 136; *Forkner v. Stuart*, 6 Gratt. 197; *Shepherd v. Trigg*, 7 Mis. 151; *Marden v. Babcock*, 2 Met. 99; *Mayer v. Clark*, 40 Ala. 259; U. S. Dig. 1st Series, Fraud. Conv. I.; *Freeman v. Pope*, L. R. 5 Ch. 538; *Bump Fraud. Conv.* 151, with numerous citations.

² Cf. *Little v. Willets*, 55 Barb. 125, with *Grover v. Grover*, 24 Pick. 261.

rigor, according as the claimant is an antecedent or a subsequent creditor.

(1.) As to antecedent creditors, the position taken in the early New York case of *Reade v. Livingston* was strongly against the donor ; and the doctrine there maintained, upon an elaborate review of the English authorities, was that every voluntary settlement or gift is absolutely fraudulent and void with respect to existing creditors ; the presumption being here a conclusive one, no matter what the circumstances attending the transfer or the amount of the donor's indebtedness. This plain and positive rule, under the weighty sanction of Chancellor Kent, has been recognized in other parts of this country, and in several States may still be pronounced the settled law.¹

But this doctrine was soon found too stern and inflexible to meet the actual statute requirements ; and in New York the courts began to relax, and then the legislature abrogated the rule.² Vermont, Pennsylvania, South Carolina, and Massachusetts were among the earliest States to dissent ; at least to the extent of shielding all donors from the conclusive presumption of fraud upon antecedent creditors, who were not deeply indebted at the time of making the gift, and favoring, in the main, a consideration of the circumstances actually attending the transfer.³ A like indulgence was found to be extended by the later English cases.⁴ And the better opinion

¹ *Reade v. Livingston*, 3 Johns. Ch. 481 ; *Den v. De Hart*, 1 Halst. 450 ; *Sexton v. Wheaton*, 8 Wheat. 229 ; 2 Kent Com. 441 ; *Thomas v. Degraffenreid*, 17 Ala. 602 ; *Belford v. Crane*, 1 C. E. Green, 265 ; *Miller v. Desha*, 3 Bush, 212 ; *O'Daniel v. Crawford*, 4 Dev. (N. C.) 197 ; 1 Am. Lead. Cas. 37.

² *Jackson v. Seward*, 8 Cow. 406 ; *Van Wyck v. Seward*, 6 Paige, 62 ; 2 N. Y. Rev. Stats. p. 137, § 4 ; 2 Kent Com. 441, n.

³ *Brackett v. Waite*, 4 Vt. 389 ; *Chambers v. Spencer*, 5 Watts, 404 ; *Howard v. Williams*, 1 Bailey, 575 ; *Parkman v. Welch*, 19 Pick. 231.

⁴ *Shears v. Rogers*, 3 B. & Ad. 362.

is at this day, that a gift is presumably valid and not fraudulent as to creditors, notwithstanding the donor's actual indebtedness at the time, if he retained property reasonably sufficient to meet all demands upon him ; though an actual fraudulent intent on his part may, of course, be shown.¹

The commonly prevailing doctrine as to the effect of gifts and voluntary settlements of personal property with reference to antecedent creditors, under the statutes against fraudulent conveyances, may be thus summed up : (1st.) Where there is clear proof that the gift was actually intended to defraud creditors, the transaction will not stand against them. (2d.) In absence of such direct proof, a mere indebtedness on the donor's part will not defeat the gift where the donor has retained enough property to reasonably meet all demands. (3d.) The mere fact that the gift has in the event prevented an existing creditor from obtaining payment of his debt will not enable him to set the transfer aside ; as the cause may have been beyond what prudence and sagacity could foresee, or perhaps the blame is imputable to the creditor himself.² (4th.) But if the donor takes from his own property, or that which the law treats as the proper fund for the payment of one's debts, more than would leave, after making the gift, a sufficient amount for settling all demands against him, the intent to defraud existing creditors is conclusively presumed, without proof of actual fraudulent intent ; for hinderance, delay, or fraud is here the necessary consequence of the gift.³

¹ Cases *supra* ; 2 Kent Com. 441, 12th ed., n. ; 1 Am. Lead. Cas. 37; *Freeman v. Pope*, L. R. 5 Ch. 538; *Babcock v. Eckler*, 24 N. Y. 623; *Thacher v. Phinney*, 7 Allen, 146; *Hinde v. Longworth*, 11 Wheat. 199; *Woolston's Appeal*, 51 Penn. St. 452; *Kent v. Riley*, L. R. 14 Eq. 190.

² *Freeman v. Pope*, L. R. 5 Ch. 538; *Brackett v. Waite*, 4 Vt. 389; *Bump Fraud. Conv.* 300; *Wilson v. Buchanan*, 7 Gratt. 334. But see *Spirett v. Willows*, 3 DeG., J. & S. 293. Creditors are not, however, to take the risk of the donor's speculations. *Mackay v. Douglas*, L. R. 14 Eq. 106; *Parish v. Murphree*, 13 How. 92.

³ *Freeman v. Pope*, L. R. 5 Ch. 538.

And it would appear that indebtedness, amounting to embarrassment, on the debtor's part, at the time of the transfer, not legal insolvency alone, will vitiate the gift against his existing creditors, on the same conclusive presumption.¹

In short, there may be a legal or constructive fraud practised upon antecedent creditors sufficient to defeat the gift as to them, however *bona fide* the intent or meritorious the true object of the transfer; for the law knows of no generosity which can rise superior to the justice of meeting one's honest debts. But if the debts are ultimately paid, or the donor accumulates other property for meeting them as judgments are obtained, the gift will generally stand.²

(2.) As to subsequent creditors, the authorities are well agreed that the question of fraudulent intention is one of fact, with little or no conclusiveness of presumption against the gift. Thus, says Chancellor Kent, whose inclinations, we have seen, were strongly to the side of creditors: "A voluntary conveyance, if made with fraudulent views, would seem to be void even as to subsequent creditors; but not to be so, if there was no fraud in fact."³ And the settled rule, as to subsequent as contrasted with antecedent creditors, is, that the gift to be void must have been made with actual fraudulent intent.⁴

¹ Parish v. Murphree, 13 How. 92; Worthington v. Bullett, 6 Md. 172; Bump Fraud. Conv. 292, 293, 295. A scanty provision for creditors, or a mere nominal amount to meet the indebtedness, will not suffice. Parish v. Murphree, 13 How. 92; Churchill v. Wells, 7 Cold. 364.

² Davis v. Herrick, 37 Me. 397; Bump Fraud. Conv. 294, 295; Kuhn v. Stansfield, 28 Md. 210; Smith v. Reavis, 7 Ire. 341.

³ 2 Kent Com. 442; Reade v. Livingston, 3 Johns. Ch. 501, 502.

⁴ Thomas v. Degraffenreid, 17 Ala. 602; Damon v. Bryant, 2 Pick. 411; Benton v. Jones, 8 Conn. 186; Sexton v. Wheaton, 8 Wheat. 229; Mattingly v. Nye, 8 Wall. 370; Bump Fraud. Conv. 324; Caswell v. Hill, 47 N. H. 407; Phillips v. Wooster, 36 N. Y. 412; Place v. Rhem, 7 Bush, 585; Sch. Dom. Rel. 282, n.; Belford v. Crane, 1 C. E. Green, 265; 1 Am. Lead. Cas. 40.

But, though the burden of proving a voluntary settlement fraudulent is thus placed upon a subsequent creditor, proof of an actual intent to defraud, hinder, and delay such creditor, would suffice for setting the transaction aside. And that any subsequent creditor has a right to attack the gift or settlement on the ground that the transfer was designed to defraud him, even though it might not have been fraudulent as to existing creditors and others, is plain upon reason and authority, notwithstanding some *dicta* to the contrary.¹

The English rule as to this class of creditors was laid down by Lord Chancellor Westbury, in *Spirett v. Willows*, as follows: "If a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to delay, hinder, or defraud creditors, or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts; that is to say, was reduced to a state of insolvency: in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void."² This suggests that the donor's actual insolvency may avail a subsequent creditor, likewise actual fraud of a miscellaneous character.

As to fraud of a miscellaneous character, available to subsequent creditors, instances are not unknown. Thus there may be some secret trust or concealment in the gift, or the omission to give some requisite notice of the transfer.³ Perhaps the transfer is simply an artifice to keep one's property

¹ 2 Kent Com. 442, Holmes, *n*; *Case v. Phelps*, 39 N. Y. 164; *Bump*, 320, 332; *contra*, 3 Co. 80; *Thacher v. Phinney*, 7 Allen, 146.

² *Spirett v. Willows*, 3 DeG., J. & S. 293; 2 Kent Com. 441; *Mackay v. Douglas*, L. R. 14 Eq. 106.

³ *Parkman v. Welch*, 19 Pick. 231; *Clark v. French*, 23 Me. 221; 1 Am. Lead. Cas. 40; *Bump Fraud. Conv.* 322; *National Bank v. Sprague*, 5 C. E. Green, 13; *Lyman v. Cessford*, 15 Iowa, 229.

out of his creditors' hands in case of future insolvency while he uses it in trade or hazardous speculations.¹ And it is a well-settled rule, that if one makes a voluntary settlement or gift with the direct and fraudulent purpose of becoming subsequently indebted, and then contracts debts in accordance with this purpose, they who are made creditors under these circumstances may avoid the settlement or gift, although their claims had not, at that date, even a contingent existence ; and this too without reference to the question of the debtor's insolvency, provided his design to hinder, delay, and defraud was thus apparent.²

Where a man is solvent at the time of settlement, and remains so reasonably long afterwards, and had contemplated doing nothing which was likely to lead to insolvency, the settlement is good.³ But it is well for the cause of upright and fair dealing, that so many of the later cases are still found adhering to the wholesome doctrine that a settlement made just before entering on a new business, and with a view of providing against its disastrous contingencies, is unavailing against new creditors as well as old ones.⁴ Still, it may be assumed, that, even here, the question of fraud is an open one, however strong might be the presumptions against the donor ; and where it appears that some other adequate provision was made by the donor, or that the subsequent creditor, in point of fact, gave credit with full knowledge that the transfer had been made, the creditor will be ruled out of court.⁵

¹ *Case v. Phelps*, 39 N. Y. 164 ; *Mackay v. Douglas*, L. R. 14 Eq. 106 ; *Mullen v. Wilson*, 44 Penn. St. 413 ; *Beeckman v. Montgomery*, 1 McCart. 106.

² *Ib.* ; *Williams v. Banks*, 11 Md. 198 ; 1 Am. Lead. Cas. 41 ; *Parish v. Murphree*, 13 How. 92 ; *Howe v. Ward*, 4 Greenl. 195 ; *Thomson v. Dougherty*, 12 S. & R. 456.

³ *Holloway v. Millard*, 1 Madd. 414.

⁴ *Mackay v. Douglas*, L. R. 14 Eq. 106 ; *Mullen v. Wilson*, 44 Penn. St. 413 ; *Beeckman v. Montgomery*, 1 McCart. 106 ; *Churchill v. Wells*, 7 Cold. 364.

⁵ *Snyder v. Christ*, 39 Penn. St. 499 ; *Williams v. Banks*, 11 Md. 198 ; *Johnson v. Zane*, 11 Gratt. 563 ; 1 Am. Lead. Cas. 41.

As to the donor's insolvency at the time of the gift, the cases show a manifest reluctance to let a voluntary settlement stand, even as against subsequent creditors, wherever the donor or settlor was largely indebted or practically insolvent at the time of the transfer. In English and American practice, subsequent and not antecedent creditors alone are here allowed relief; their right depending, however, upon the proof of pre-existing debts.¹ As to the conclusiveness of any presumption on their behalf from the fact of the donor's insolvency, apart from the rights of antecedent creditors, there may be reasonable doubt, so far as American courts, at least, are concerned. But it should be remembered, that subsequent creditors do not stand alone in attacking such transfers; so they may well give antecedent creditors the first chance at presumptions; for there still remains the benefit of that general rule of equity which allows subsequent creditors to participate in the fund wherever the transfer has been set aside for fraud at the instance of the prior creditors.²

Whether the executor or administrator of a donor who has died insolvent can set aside any voluntary settlement or gift made during the donor's life in fraud of creditors is disputed; but it is clear that the creditors can pursue their own remedies, in which case the personal representative of the deceased donor would well be made a party, so that the property when recovered could go in a course of administration.³ But as concerns a gift of personal property *inter vivos*

¹ 2 Kent Com. 442, *n.*; Churchill v. Wells, 7 Cold. 364; Huggins v. Perrine, 30 Ala. 396; Crossley v. Elworthy, L. R. 12 Eq. 158; Jenkyn v. Vaughan, 3 Drew. 419; Holloway v. Millard, 1 Madd. 414; Lush v. Wilkinson, 5 Ves. 384.

² Bump Fraud. Conv. 329; Ammons' Appeal, 63 Penn. St. 284; Richardson v. Smallwood, Jacob, 553; Churchill v. Wells, 7 Cold. 364; Thomson v. Dougherty, 12 S. & R. 448; Reade v. Livingston, 3 Johns. Ch. 499; 1 Am. Lead. Cas. 42.

³ See 1 Am. Lead. Cas. 43; Dorsey v. Smithson, 6 Harr. & J. 61; Brockman v. Bowman, 1 Hill Ch. 338.

made near the time of the donor's death, our local practice has in some instances followed the course so frequent in the essentially distinct case of a gift *causa mortis*; namely, to permit the administrator, as *quasi* representative of the creditors, to recover the property or its value in a suit at law against the donee. The money thus recovered is dealt with as assets for debts and charges of administration.¹ But if any balance is left over, it goes, as a matter of course, not to the next of kin, but to the donee; for the revocation of any gift for the benefit of creditors is only *pro tanto*.² And so long as there remain legacies under a will for abatement, or assets generally, the gift cannot be disturbed at all.³

These fundamental doctrines of fraudulent conveyances are to be gathered from a multitude of precedents, which relate chiefly to large dispositions of real and personal property in the mass, and not to those single chattel transfers of comparatively small consequence to which the term "gift" is most commonly applied in familiar intercourse. But whatever presumptions of fraudulent intent may avail in the one instance, are as a rule likewise available in the other, though probably with more, and certainly not less, indulgence to proof tending to rebut a dishonest purpose. Another thought is suggested: that as these decided cases almost invariably deal with voluntary settlements which a debtor has made upon his wife and children, or others closely allied by blood and affection, it might be found, on the other hand, that the presumptions of fraudulent intent would be more readily applied where a settlement or gift is made to a mere stranger. The *dicta* in some of the cases do certainly give some color for such a supposition; laying, as they do, much stress upon this so-

¹ *Abbott v. Tenney*, 18 N. H. 109. And see *Marsh v. Fuller*, 18 N. H. 360; *Gilleland v. Failing*, 5 Den. 308.

² *Ib.*; *Reade v. Livingston*, 3 Johns. Ch. 481.

³ *Biddle v. Carraway*, 6 Jones Eq. 95.

called consideration of blood and affection ;¹ and yet, so far as the current of decisions goes, there is nothing to justify a difference between gifts to relatives and gifts to third persons. But should the courts ever seek to raise such a distinction, gifts of gratitude, though not to members of one's immediate family, would deserve their high favor.

The doctrine of executed gifts appears, on the whole, to be this: That a gift once executed is irrevocable and binding as concerns the parties thereto, and executors, administrators, heirs, and others who derive title through either or stand as mere representatives, unless such mental incapacity, fraud, force, or utter error may be set up, on behalf of donor or donee, as will usually invalidate contracts, or the parties concerned subsequently rescind or modify the transfer upon mutual agreement. That the gift is in general irrevocable and binding against the world. But that, as concerns the donor's creditors, and subsequent *bona fide* purchasers without notice, or in the case of a gift of that which one does not own, the transfer cannot operate to the extent of defrauding one whose right is thus paramount to that of the donee ; and such persons, under suitable limitations, may impeach the gift accordingly. That which underlies this whole doctrine of revocation of gifts, against the mutual consent of the parties thereto, is that one who suffers wrong in respect of his own property because of the gift is allowed to impeach the transfer.

II. In the foregoing pages the subject of gift has been considered in the sense of absolute and simple gifts between man and man. But gifts may be, and frequently are, bestowed with some condition or reservation imposed by the giver ; in which case the transfer is sometimes to be upheld as a qualified gift, and sometimes fails altogether, according to circumstances. A few words, then, as to these qualified gifts.

¹ See *Lerow v. Wilmarth*, 9 Allen, 382.

We have elsewhere shown that, in modern times, expectant interests are sustained in personal to much the same extent as in real property ; that such interests may now be created by deeds of trust, and not by will only ; that, while perishable chattels constitute a necessary exception to this rule, those of the more durable sort, and especially capital invested in incorporeals, like stock, bonds, and mortgages, may be limited over by way of remainder, some intermediate party receiving the income as a particular interest.¹ We have shown, too, that every interest in personal property, which is provided to take effect *in futuro*, is of an indestructible nature, and will take effect in its own proper turn, so long as there has been no violation of the rule against perpetuities.² Nor, as we have seen, is the rule an invariable one, that the property shall be bestowed to trustees named, as equity reluctantly suffers any trust to fail for want of a trustee, and will sometimes compel the party in possession to execute it faithfully.³

A gift of personal property may then be made *inter vivos* in trust, for specified objects or to specified parties ; for beneficial enjoyment in succession, or under various qualifications. These are elementary features of the voluntary settlements so common in English practice, but comparatively rare in our own. And common prudence suggests that any trust of personalty *inter vivos* which contemplates long delay before the vesting of the remainder, a succession of expectant interests, or peculiar limitations in the gift, should be expressed by some formal instrument in writing, with the qualifications clearly set forth. Yet trusts of a simple character are sometimes attached to gifts by word of mouth at the time of delivery, and these the courts will sustain on proof of mutual intention. Thus, where the father of an illegitimate child delivered to his brother (who afterwards

¹ 1 Sch. Pers. Prop. 161-169, *passim*.

² 1 Sch. Pers. Prop. 181.

³ *Ib.* 166.

became the executor of his will) promissory notes, under a verbal trust that the amount collected upon them should be appropriated to the child's support and bringing-up, the trust was sustained to that extent. And the child having died before the fund was exhausted for that purpose, it was further held, in accordance with the donor's obvious intent, that the residue did not belong to the child's estate.¹

A gift may be made in the alternative, or so as to put the donee to his choice ; in which case such choice must be made by him before delivery and acceptance can take effect.² And as to conditions in general, the usual rules would apply. Thus, any lawful condition precedent imposed by the giver cannot be repudiated by the donee ; nor will the latter's title vest until he has performed the condition.³ On the other hand, where a father gave his grown daughter a calf, provided she would bring it up, and she has brought it up accordingly, the gift becomes complete through compliance with the condition.⁴ And it is an equity rule, though put in practice to bequests rather than gifts, that where there is an absolute gift with some illegal condition or limitation annexed, the limitation fails, and the donee may retain the whole.⁵

An implied resulting trust, in the donor's favor, arises in equity where personal property which is transferred by way of gift purports to have been made upon trust, and yet no distinct use or trust is stated. Here the question of title is, to be sure, open to proof ; but the *onus* is on the donee to

¹ *Marston v. Marston*, 1 Fost. 491. And see *Brummet v. Barber*, 2 Hill (S. C.), 543.

² *Brink v. Gould*, 7 Lans. 425.

³ *Berry v. Berry*, 31 Iowa, 415 ; *The Lucy Ann*, 23 Law Rep. 545.

⁴ *Martrick v. Linfield*, 21 Pick. 325.

⁵ 2 Spence Equity, 23, 80, 229 ; *Smith's Equity Manual*, 157 ; *Crow v. Bell*, 2 Brev. 140. And see 1 Sch. Pers. Prop. 739 ; 2 Redf. Wills, 294 *et seq.* As to legacies, the rule seems the same, whether the condition be precedent or subsequent ; but *qu.* whether a gift *inter vivos* can take effect if the illegal condition be a condition precedent.

prove that a beneficial gift to himself was intended, otherwise the gift must fail.¹

But whenever a transfer of personal property is made from parent to child, with no declared trusts, the presumption is that an absolute, not a qualified, gift was intended.² And, leaving family settlements out of view, the presumption is, doubtless, a general one, if the circumstances show a gift at all, that this gift was designed as absolute ; for chattel qualifications or reservations are not to be favored, and should only subsist on proof, as exceptions to the rule of simple transfer. And where no circumstances exist for raising a resulting trust by implication, a transfer once perfected will be regarded as a beneficial gift.³ So, too, where there is an absolute, and, to all appearances, a beneficial gift, with an ineffectual or partial trust ingrafted on it, the property, or so much as is unexhausted by the partial trust, will remain in the donee.⁴

A gift may be made subject to the donee's discretion. Here, if the discretion conferred be so large as to practically confer dominion, the gift is to be regarded an absolute, not a qualified one ; as where a gift is made with an uncontrolled power in the donee to bestow the property upon such persons and for such purposes as he shall see fit. On the other hand, if the donee's discretion is limited to certain general purposes designated by the donor, though they may be too general to be enforced, the gift cannot be regarded as absolute to the donee.⁵

Where the gift is made subject to certain qualifications or reservations to the donor himself, it is not always easy to

¹ Story Eq. Jur. §§ 1197, 1199; 2 Spence Eq. 80; *Briggs v. Penny*, 3 Mac. & G. 546.

² *Hepworth v. Hepworth*, L. R. 11 Eq. 10; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Whitfield v. Whitfield*, 40 Miss. 352.

³ Story Eq. Jur. §§ 1197, 1199.

⁴ 2 Spence, 23, 80; *Smith Equity*, 157.

⁵ 2 Spence, 199, 225; *Smith Equity*, 158.

determine with precision whether there has been a valid gift or not. Doubtless, the true principle is, that the donor should have parted with all dominion over the property to the donee, and that, thus much being accomplished, he may yet reserve some right or interest to himself not inconsistent with the immediate vesting of a beneficial title to the property in the donee ; but, on the other hand, that any reservation which in effect takes back all that was given, or postpones the vesting of title to the future, is no gift at all. Any lawful condition precedent would be, before fulfilment, an obstacle, of course, to the vesting of the gift ; but in such case, the donee could proceed to fulfil the condition and make his title complete ; nor would it be out of place for the donor to impose some condition subsequent, on the happening of which the title, in whole or in part, to the property or its proceeds or income, should revert to himself. But in the present lax state of transfer requirements, the difficulty is to determine what is and what is not a consistent reservation.

Qualifications or reservations on a donor's behalf relate frequently to the increase, use, or income of the property bestowed. Any gift of chattels, which expressly reserves the free use of the property to the donor, for a certain period, or (as commonly appears in the cases which the courts have had occasion to pass upon) as long as the donor shall live, is ineffectual.¹ This doctrine we conceive to be universal, as founded in common reason ;² for what does such a mock transfer amount to beyond a promise to give in the future ? The owner is seeking to make another grateful for that which he wants to keep still to himself ; and the result

¹ *Lance v. Lance*, 5 Jones L. 413; *Pitts v. Mangum*, 2 Bailey, 588; *Withers v. Weaver*, 10 Penn. St. 391.

² That donations are invalid under the civil code of Louisiana, when the usufruct of the property donated is reserved to the donor, see *Tillman v. Mosely*, 14 La. Ann. 710. *Hope v. Hutchins*, 9 Gill & J. 77, is not easily reconciled with the rule of the text; but the decision turned upon the intention manifested in a peculiar deed.

must be a drawn battle between generosity and selfishness, leaving the situation as before. And yet there may be a valid reservation of increase or usufruct under certain circumstances. Thus, the gift of a mare, with the stipulation that if she should prove to be with foal, the offspring should be the donor's, is a gift with a perfectly valid reservation to the giver ; for such a reservation is not inconsistent with a present and complete beneficial interest in the mare in the donee.¹ And so, too, one might give away only the use or income of a thing, and not the thing itself ; though this would be, logically speaking, a loan, rather than a gift.

Still less effectual should be a gift which contemplates not only the reservation of present enjoyment, but the right of disposing besides, leaving only the future residue undisposed of to the donee. Thus, the assignment of a certificate of deposit by way of gift to a party in trust for the donor's son, is of no avail when coupled with a reservation to the donor of the *jus disponendi* and beneficial enjoyment to himself for life, the residue only to be paid at his death to the son.² And there are numerous decided cases of transfers which, from a certain stand-point, resemble gifts *causa mortis* more than gifts *inter vivos*, but which certainly fail as gifts under the latter designation, because the purpose manifested by the giver is to retain the present dominion, subject only to the future contingency of his death. Thus, if one going to the seat of war as a soldier, or setting off upon some hazardous journey, hands personal property to a friend, to belong to the latter, or by him to be delivered to some third person, if the giver never returns, but otherwise to be reclaimed by the giver, — here is no valid gift *inter vivos* ; for the property is taken under a trust for the donor himself, whose real purpose is clearly to retain the dominion while he lives.³

¹ Wolf v. Esteb, 7 Ind. 448.

² Withers v. Weaver, 10 Penn. St. 391.

³ Walden v. Dixon, 5 Monr. 170; Linsenbigler v. Gourley, 56 Penn.

On the other hand, there are numerous instances in which certain reservations annexed to a gift by the donor have been deemed quite consistent with the purpose of gratuitous transfer. Thus, there may be a gift, notwithstanding the donor reserves the right to borrow, or receive some kind of personal profit out of the transfer.¹ As in the instance of a gift of money, with the reservation of a sum by way of interest.² For such reservations or conditions appear to have only the effect of making the gift a qualified or partial one, instead of an absolute or full one. The transaction would stand, at all events, were we to regard it as a mutual contract on very slight consideration, rather than as a pure gift. Some of the latest cases certainly carry the donor's right of reservation very much farther; and to the extent, as it would appear, of not requiring him to totally exclude the power or means of resuming possession. As in a Massachusetts case, where a transfer on trust was upheld as a qualified gift, notwithstanding the donor had expressly retained a right to modify the uses and revoke the trust, — a right of which, however, he never availed himself.³

Personal property, under the operation of ancient acts and our modern statutes against fraudulent conveyances, cannot

St. 166; *Irish v. Nutting*, 47 Barb. 370; *Smith v. Dorsey*, 38 Ind. 451. See *Baker v. Williams*, 34 Ind. 547. The judicial expression used in some of these decisions is (and, as it seems to us, inaccurately), that the gift is coupled with a condition, upon the happening of which the owner is to resume possession. If it were a complete gift, with condition subsequent, why should it not vest? See *Irish v. Nutting* and *Walden v. Dixon*, *supra*. As to whether such transactions can be sustained as gifts *causa mortis*, see c. 4, *infra*.

¹ *Doty v. Wilson*, 47 N. Y. 580; *M'Kane v. Bonner*, 1 Bailey, 113; *High v. Stainback*, 1 Stew. 24.

² *Doty v. Wilson*, *supra*. This case does not decide whether such reservation for interest is enforceable, but that the reservation does not invalidate the gift.

³ *Stone v. Hackett*, 12 Gray, 227. And see *Cooper v. Burr*, 45 Barb. 9.

be conveyed in trust for the donor's own use, so as to avoid the demands of his creditors, and yet enable him to enjoy it as his own.¹ Nor can a donor bestow chattels upon another so that he shall have the beneficial use, and, at the same time, defy his creditors ; but, in order to exclude creditors, the property should be expressly given upon some limitation over in the contingency of the donee's bankruptcy or insolvency, thereby determining such donee's interest, and carrying the gift over to some one else.²

In determining whether or not any qualification was annexed to the gift, the transaction is to be viewed in the light of surrounding circumstances. And if a deed of gift or other writing be relied upon, the different expressions therein contained are to be construed together for gathering the donor's full intent. It matters not that the gift is first made in absolute terms, and the language of condition or reservation follows subsequently ; for if from the construction of the whole instrument there appears to be a condition or reservation, consistent with the purpose of giving, the transfer stands as a qualified and not as an absolute gift.³

¹ *Supra*, pp. 101, 102 ; Bump Fraud. Conv. Appx., showing that English and American legislation is quite explicit on this point ; 3 Co. 80.

² *Mebane v. Mebane*, 4 Ired. Eq. 131 ; *Graves v. Dolphin*, 1 Sim. 66.

³ See *Knott v. Hogan*, 4 Met. (Ky.) 99 ; *Pitts v. Mangum*, 2 Bailey, 588.

CHAPTER IV.

GIFTS CAUSA MORTIS ; PRELIMINARIES.

THE gift *inter vivos*, or ordinary gift, already described, differs from that which now remains to be considered, in this very marked respect, — that it is the pure act of the parties themselves, with the manifest intention, on the part of the donor, to divest himself at once of a title which he might have longer retained ; whereas the gift *causa mortis* is executed in view of death, and with the expectation of being parted from one's worldly goods altogether. Hence the latter transaction, instead of being a merely gratuitous transfer as between parties, adds death as a necessary party, and amounts, in the light of the donor's intent, to little more than a designation of the person who shall take when his own term of beneficial enjoyment must needs expire. Yet this kind of transfer, though hardly to be deemed free, willing, and generous, is a gift, and in many respects is subject to the same rules as ordinary gifts ; but, at the same time, akin to legacies, and with decided testamentary features.

The most appropriate definition of a gift *causa mortis*, at our law, seems to be, according to the tenor of the decisions, that it is a gift of personal property made by a party in the expectation of death then imminent, carrying the essential condition that the property shall belong fully to the donee in case the donor dies as anticipated, leaving the donee surviving him, and the gift is not meantime revoked, but not otherwise.¹ There is difficulty in framing an exact and compre-

¹ A gift *causa mortis* is defined in Bouvier's Dict. as one made by a person in sickness, who, apprehending his dissolution near, delivers, or

hensive definition, from the discrepancies which have developed between the common and civil law on the subject, and a corresponding want of uniformity in our modern local decisions ; the regret being sometimes expressed that such anomalous transfers were ever admitted at all.

Yet so simple and natural are these death-bed gifts, accompanied as they usually are with the formalities of corporeal delivery which must have prevailed from an early period of history, that we may well believe this mode of transfer far antedated the solemn testamentary dispositions which belong to a more enlightened age of jurisprudence, when the facilities for reading and writing are multiplied, learning flourishes, and property law has taken a strong root. Instances of gifts *causa mortis* are found among the traditions of savage tribes, and in

causes to be delivered, to another, the possession of any personal goods, to keep as his own in case of the donor's decease. This definition comes from Blackstone. See 2 Bl. Com. 514. Woodward, J., in *Michener v. Dale*, 23 Penn. St. 59, says: "*Donatio causa mortis* is a gift of a chattel made by a person in his last illness, or *in periculo mortis*, subject to the implied conditions that if the donor recover, or if the donee die first, the gift shall be void;" and this is substantially the definition formerly given by Tilghman, C. J., of Pennsylvania, which was later criticised by Gibson, C. J., in *Nicholas v. Adams*, 2 Whart. 22, who, in his turn, is overthrown by this latest decision. Judge Redfield's definition is that of "a gift of personal estate, made in prospect of death at no very remote period, and which is dependent upon the condition of death occurring substantially as expected by the donor, and that the same be not revoked before death." 3 Redf. Wills, 2d ed. 322. *Grattan v. Appleton*, 3 Story, 755, says, that to constitute a donation *causa mortis* there must be a transfer of property in expectation of death from an existing illness dependent on the condition of death resulting therefrom.

The chief difficulties found in reducing the body of our decisions to a concise definition appear to be these: (1st) that the essential conditions to such gifts are not always clearly seen; (2d) that uncertainty has always prevailed as to how far the gift must be in expectation of death. As much of the confusion grows out of decided differences between our English and American gifts *causa mortis* and the old *donatio causa mortis* of the Romans, it would be better for our courts to designate these transfers as gifts and not donations, and thus aid in working clear of all attempts to borrow an English definition from the Institutes of Justinian.

the earliest records of authentic history; and the student of the oldest Greek classical poem becomes readily familiar with them.¹ Testamentary bequests in an unlettered age could hardly have been made, in fact, in any other manner.

Our own law on the subject has been traced back more immediately to the Roman jurisprudence, whose doctrines we have in the main adopted, but with some important qualifications. The equity courts of England took such gifts early under their special protection, our first reported cases being decided in chancery about 1710.² In 1751 Lord Hardwicke reviewed the subject at length, and traced for the first time in English judicial history the vital connection between the common and civil law of such transfers. It would appear that Bracton and Swinburne, of the early writers, had made the civil law of donations, as laid down in the Institutes, somewhat familiar to the English lawyers; and that this kind of gift was not altogether new in practice even at that early period. But the clear-headed Chancellor, referring to a description of these Roman gifts in Swinburne, since admitted to be inaccurate, as consisting of three several kinds, showed here a determination to found an independent English law of gifts *causa mortis*; they were not, he said, to be allowed in England farther than the civil law on that head had been received and allowed. And admitting that

¹ See 2 Bl. Com. 514. Blackstone thinks the civilians borrowed the law of gifts *causa mortis* from the Greeks. And in his note *ib.*, instances of such donations are referred to, in the *Odyssey*, b. 17, v. 78, from Telemachus to Piræus, and from Hercules, in the *Alcestis* of Euripides, v. 1020. But such gifts were probably made much earlier. See Gen. xlviii. 22; Plutarch's Solon.

² 2 Bl. Com. 514; *Jones v. Selby*, Prec. in Ch. 300; 2 Kent Com. 445. And see *Drury v. Smith*, 1 P. Wms. 404; *Lawson v. Lawson*, 1 P. Wms. 440. Kent takes *Jones v. Selby*, *supra* (A. D. 1710), as the earliest English case. But in 1708, *Hedges v. Hedges* (Prec. in Ch. 269) was decided, wherein the Lord Chancellor, though not passing upon the doctrine specially, was led to point out the difference between a legacy and *donatio causa mortis*, in accordance with a rule already admitted to exist.

the civil law might sometimes dispense with delivery in gifts of this description, he laid down the English rule as one which required delivery throughout. "The consequence is," he says, "that by the civil law, as received and allowed in England, and consequently by the law of England, tradition or delivery is necessary to make a good donation *mortis causa*." ¹ So this mode of transfer came into our law with the gift qualities quite prominent.

It might not be easy to say with precision whether a gift *causa mortis* is an imperfect gift, to take effect only on a condition precedent; or a vested gift, defeasible on subsequent conditions: they appear to be regarded now in the one aspect, and now in the other. But, at all events, such gifts are distinguishable on principle from legacies. For that title which passes on delivery is so far perfected in the donee before the donor's death, that the property does not become liable to contribution with legacies in case the assets prove insufficient for the settlement of debts, but is only subject to creditors on the usual principle that perfected gifts must not prevail to the extent of defrauding persons with prior rights.² Nor, upon a like reasoning, can the requirements of the statutes of wills, regarding formalities of execution and probate, the appointment of a legal representative, or the common incidents of administration, have any application to this class of transfers.² The will which gives a legacy, too, may have been

¹ *Ward v. Turner*, 2 Ves. Sen. 436. How far delivery is still to be deemed essential is considered, *post*. The correctness of the following Latin definition, and the inaccuracy of Swinburne, pt. 1, § 7, pl. 2, in setting forth three species of donations, is noticed by Lord Loughborough in *Tate v. Hilbert*, 2 Ves. Jr. 119. This Latin definition is from the Institutes of Justinian, tit. 7. "Mortis causâ donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitatis ei contigisset, haberet is, qui accepit; sin autem supervixisset is, qui donavit, reciperet; vel si eum donationis pœnituisset; aut prior decesserit is, cui donatum sit."

² 2 Kent Com. 448, n.; *Marshall v. Berry*, 13 Allen, 43, 46; Bouv. Dict. "Gifts;" *Moore v. Darton*, 4 De G. & Sm. 517.

made long before the testator apprehended death; but the gift *causa mortis* springs out of the peril as really apprehended. On the other hand, a gift *causa mortis*, even after passing the formalities of delivery, differs from gifts *inter vivos* at our law, not only in setting up the condition of death, but in further being subject to revocation by the donor himself, and requiring that the donee actually survive him. Kent says that it was a disputed point with the Roman civilians whether such donations resembled a proper gift or a legacy; but that the correct opinion finally established was, that while a gift was irrevocable, a gift *causa mortis* was conditional and revocable and of a testamentary character, and made in apprehension of death.¹ In the early opinion of the English chancery courts, the gift *causa mortis* was regarded as a mere testamentary disposition.² Blackstone has ranked these transfers, together with legacies, under title by will and administration; and our later elementary writers on these subjects usually treat of gifts *causa mortis* in the same connection.³

The truth is, that gifts *causa mortis* occupy a middle ground between ordinary gifts and legacies; in some respects they partake of the nature of a contract, in others they are testamentary. And so was it with the Roman donation. The civilians have pointed out no less than eight points of similarity which such donations bore to legacies, and four points in which they were quite dissimilar, in some of which respects the gift *causa mortis* of our law presents a parallel.⁴ Nor have our writers and the courts failed to enlarge upon the particulars which on the one hand clearly distinguish such transfers from legacies, and, on the other, from gifts *inter*

¹ 2 Kent Com. 444.

² See *Jones v. Selby*, Prec. in Ch. 300 (A. D. 1710).

³ 2 Bl. Com. 514; 1 Wms. Ex'rs, pt. 2, bk. 2, ch. 2, § 4; 3 Redf. Wills, 2d ed. 322 *et seq.*

⁴ Colquhoun Rom. Law, § 1072.

vivos.¹ In no respect is it so closely allied to the former species of property as in the incomplete, ambulatory, revocable character of the transfer while the donor lives; while its chief characteristic as a gift at English and American law must be seen in the delivery formalities which attend its execution.

Whatever is designed to take effect as a gift *causa mortis* must be carefully distinguished from intended testamentary dispositions. Thus, if a person, with a view to approaching death, should make a will which fails of complete execution under the statute, this abortive testamentary act cannot be construed into a valid gift *causa mortis*.² For the formalities attending a will are one thing, and the formalities of a gift *causa mortis* quite another. Nor can instruments utterly wanting the mutual formalities and the consideration which should attend contracts be sustained as contracts after the death of the party executing, when the design was manifestly that of making a gift to take effect after death.³ Any promise to give, which is meant to take effect only after the decease of the party promising, and is unaccompanied by that mode of delivery recognized in gifts *causa mortis*, must be regarded as *nudum pactum* and unenforceable; unless a consideration interposed may support it as a contract, or solemn execution bring it up to the footing of a will.⁴

So, too, should an intended gift *causa mortis* be distin-

¹ In 1 Wms. Ex'rs, 7th Eng. ed. 781, the differences are thus pointed out: I. Unlike a legacy, because (1) probate is unnecessary; (2) executor's assent is unnecessary. II. Unlike a gift *inter vivos*, because (1) it is revocable under circumstances; (2) it may be made to donor's wife; (3) it is liable to legacy duty; (4) it is liable to debts of testator on deficiency of assets. But this analysis is far from satisfactory.

² *Miller v. Jeffress*, 4 Gratt. 472; *Stone v. Gerrish*, 1 Allen, 175; *Grattan v. Appleton*, 3 Story, 755; *Mechling's Appeal*, 2 Grant Cas. 157; *Hamor v. Moore*, 8 Ohio St. 239.

³ *Stone v. Gerrish*, 1 Allen, 175; *Hamor v. Moore*, 8 Ohio St. 239.

⁴ See *Frost v. Frost*, 33 Vt. 639.

guished from that which was meant to be a gift *inter vivos*. For the requisites of these gifts and the consequences of a transfer are not identical, and circumstances which could not affect the one might utterly invalidate the other. As controversies of this character will arise after a donor's death, the formalities in either case being usually slight, it is often hard to say to which class the gift should be appropriately referred; but where delivery was made under such near approach of death as consists with the supposition that the giver contemplated it, a gift *causa mortis* will be presumed rather than the ordinary gift *inter vivos*.¹ Under such circumstances the giver need not expressly declare that his gift is accompanied by the condition of death from the existing peril, for the law will infer it for him.²

A gift *causa mortis* is, like any other gift, substantially a gratuitous transfer. Nor does gratitude, family affection, or other like motive prompting the donor to its execution render it otherwise. Yet services might be rendered by a party in the expectation of just compensation from the estate, or upon some understanding that a legacy would be bestowed in return. And here, once more, the idea of a gratuity should be separated from that of legal consideration, in case a claim is brought against the estate of the deceased party who has received benefits by the party who rendered them. The mortuary gift may fail for informality; not so, however, the mutual contract for recompense. Hence, if a gift *causa mortis* were promised, partly from motives of affection and partly upon consideration of services rendered, and the gift failed for want of formality, the question would be not so much

¹ *Merchant v. Merchant*, 2 Bradf. (N. Y. Surr.) 432; *Delmotte v. Taylor*, 1 Redf. (N. Y. Surr.) 417; 1 Wms. Ex'rs, 7th Eng. ed. 772.

² *Ib.*; *Gardner v. Parker*, 3 Madd. 184; *Staniland v. Willott*, 3 Mac. & G. 664, 675. *Aliter*, where a gift *inter vivos* was plainly intended. *Edwards v. Jones*, 1 Myl. & Cr. 226.

what was the amount of the gift *per se*, as what was the understood amount of recompense.¹

The peculiar features of these death-gifts at our law, and the modifications under which the Roman doctrine of donations *causa mortis* has been admitted into the jurisprudence of England and America, will further appear in the course of this and the following chapters. The law of gifts *causa mortis* will be treated at length under the following heads: (1.) the capacity of parties to the gift; (2.) the property which may be given; (3.) expectation of death; (4.) the method of executing the gift, including delivery; (5.) the effect of execution as between donor and donee, including revocation of the gift; (6.) effect of execution as to third persons, including the donor's creditors; (7.) qualified gifts *causa mortis*; (8.) general policy of such gifts.

(1.) As to the capacity of parties to the gift. Of the general rules of mental incapacity and fraud as applicable to gifts we have already spoken, the usual standard being that of contracts.² But gifts *causa mortis* present some singular aspects; and it might be a fair question whether the mental test should not be testamentary rather than contract capacity. By the imperial law of Rome, whoever would make a donation in contemplation of death must have been capable of making a testament; and Ulpian has noted various classes of persons — such as those deaf and dumb, Christian apostates, and so on — who could contract, and yet were disqualified from making a *donatio causa mortis*, for want of testamentary capacity.³

But as the formalities attending the execution of the Roman

¹ *Frost v. Frost*, 33 Vt. 639. *Semble* that this principle might have availed the claimant in *Stone v. Gerrish*, 1 Allen, 175.

² See *supra*, p. 62.

³ See Pand. 39, 5, 7, § 6; Colquhoun Rom. Law, § 1069.

donation *causa mortis* partook far more of the testamentary character than the corresponding gifts of our law, — certain writings in presence of witnesses being required, — the two cases cannot be deemed quite analogous. Our gifts *inter vivos* certainly rank with contracts. And while wills are usually made with reference to a general disposition of one's whole estate, real and personal, gifts *causa mortis* are still for the most part, and some will say altogether, solitary and exceptional transfers, with the formalities attendant upon gifts *inter vivos*. And, from another point of view, there is a decided difference between wills and gifts; for a testamentary disposition may be planned and executed whenever the owner of property sees fit to do so in the exercise of a sound and disposing mind and memory; whereas the gift *causa mortis* should, properly speaking, be made in the closer contemplation of approaching death, often, too, under circumstances when the mind is little likely to be clear and the will unfettered. Why might it not be said, then, in the absence of positive adjudication, that the test of mental capacity here is essentially that of mental capacity for the gift *causa mortis*; and not, as an arbitrary test, that of testamentary capacity or ordinary contract capacity?

Any such gift, so far as it largely diminishes the giver's general estate, or any number of such gifts made contemporaneously to different parties, would seem, then, to call for evidence of that sound and disposing mind capable of appreciating one's full relation to the proper objects of his bounty, which is the usual testamentary test. But otherwise, and especially where some trifling memento is given accompanied by delivery, the test of ordinary gifts or contracts might fairly suffice.¹ That gifts *causa mortis* ought under all circumstances to be jealously scrutinized, and set aside without hesitation in every case of doubt, since the opportunities are

¹ See opinion in *Crum v. Thornley*, 47 Ill. 192.

peculiarly favorable for one in attendance upon a dying man to influence the disposition of his effects, and even to appropriate without permission what he might afterward claim as a gift, the decisions abundantly show.¹

But, to confine the discussion more closely to the classes of persons absolutely disqualified by the law, it would appear that the principles which regulate testamentary capacity rather than contract capacity are favored in some of our States, as under the Roman law. But the inclination of the courts in other States is precisely opposite. Thus, in New Hampshire, it is held that the wife's gift *causa mortis* is, like her will, valid only by the husband's consent.² In Massachusetts, on the other hand, the sweeping language of the married women's acts, which allow the wife to bargain, sell, and convey, and enter into any contracts with reference to her separate property, in the same manner as if she were sole, is held quite sufficient to empower her to make a valid gift *causa mortis*, independently of the statute of wills.³

Other questions of capacity have arisen respecting the parties who occupy the marital relation, and their gifts *causa mortis*. Thus, the validity of such a gift to the donor's wife has long been set forth by common-law writers, as an incident which quite distinguishes this kind from gifts *inter vivos*.⁴ The incident now survives the distinction; for, doubtless, a gift *causa mortis* from husband to wife is as good as before, while

¹ *Shirley v. Whitehead*, 1 Ired. Ch. 130; *Thorp v. Amos*, 1 Sandf. Ch. 26; *supra*, p. 63. And see *post* as to delivery.

² *Jones v. Brown*, 34 N. H. 439; Sch. Dom. Rel. 260, 261. See *Moore v. Darton*, 4 De G. & Sm. 517.

³ *Marshall v. Berry*, 13 Allen, 43. Says Wells, J., of the gift *causa mortis*: "Although it is of a testamentary character in some of its incidents, . . . yet, inasmuch as, by our law, an actual delivery, or some equivalent act, by the donor, in his lifetime, is necessary to its validity, we think it must be regarded as, in its essential character, a gift."

⁴ 1 Wms. Ex'rs, 7th Eng. ed. 781; 2 Kent Com. 445; Bouv. Dict. *Donatio Mortis Causa*. See Sch. Dom. Rel. 285, as to the modern rule of gifts *inter vivos* from husband to wife.

such gifts *inter vivos* are to be deemed no longer inevitably void.¹ Nor, in a case free from fraud or undue influence, does there appear any good reason why a wife may not make her own husband the donee *causa mortis* of property belonging to her separate use.² Gifts of this character, like those *inter vivos*, may, of course, be made from parent to child; and so, too, from a child of suitable capacity, acting freely and voluntarily, to his parent.³

(2.) As to the property which may be given. At the outset, it should be asked, whether a gift *causa mortis* may embrace the whole of the donor's property.

The Roman law in this respect was changed by legislation from time to time, for the protection of the heir as against excessive dispositions, whether by legacy or gift. By the Twelve Tables, the power of an unlimited disposition had been conceded; and that the heir might not be stripped of his patrimony, the Furian law was enacted (about 183 B. C.), which made a thousand asses the maximum that any legatee or donee *causa mortis* could take. According to Gaius, this law failed, because a testator with five thousand asses might distribute the whole property among five legatees or donees, and leave the heir empty-handed. Next came the Voconian law (about 169 B. C.), which declared that no such legatee or donee should take more than the heir; but this likewise failed, because the ancestor might distribute the estate among such a multitude of legatees, that the heir's portion would be too small to justify him in undertaking the burden of succession. Finally, the Falcidian law (40 B. C.) was passed, which pro-

¹ *Gardner v. Gardner*, 20 Wend. 526; *Turpin v. Thompson*, 2 Met. (Ky.) 420; *Meach v. Meach*, 24 Vt. 591.

² *Caldwell v. Renfrew*, 33 Vt. 213. And, as to the wife's gift *causa mortis*, see further, *Lawrence v. Bartlett*, 2 Allen, 36; *Sch. Dom. Rel.* 261, 286.

³ *Baxter v. Bailey*, 8 B. Monr. 336; *Thompson v. Thompson*, 12 Tex. 327.

hibited giving away, in legacies and donations *causa mortis*, more than three-fourths of one's entire estate, whereby at least one-fourth of the property was secured to the heir ; and this collar, once slipped on, held fast.¹

This curious contest between state and citizen, in which the latter, aided no doubt by the cunning of legal advisers, contrived so long to evade the spirit while conforming to the letter of the law, is not without its lesson for modern legislators. Our own statutes appear less solicitous for the heir ; but provisions, somewhat resembling those of the Falcidian law, are sometimes introduced into our legislation for the benefit of husband or wife.² And, while it would be difficult to say just how large a proportion of one's estate might or might not be bestowed by a gift *causa mortis*, independently of positive legislation, the doctrine has been stoutly maintained of late that gifts *causa mortis* cannot prevail to the extent of an utter disposition of all the donor's personal property, since the effect might be to set at nought the wholesome provisions of our statutes of wills.³

This is certainly a strong position ; but only tenable on the assumption that it is best to make a final stand against these informal death-bed dispositions, regardless of all precedent. For, as it has been contended, on the other hand, no English or American case can be found up to 1851, where any attempt has been made to limit the operation of a gift *causa mortis* on account of the comparative or absolute extent of the property disposed of ; and if a man of great worldly possessions may hand over, in his last illness, securities to the amount of thousands of dollars, and so far modify his will, it is not easy to say, with our eyes open to the decisions, that an humble laborer, having only a hundred dollars laid by in his strong-box, may not deliver his money as well.⁴ And if such a gift

¹ Gaius, §§ 224-227.

² See Sch. Dom. Rel. 256, *n*.

³ *Headley v. Kirby*, 18 Penn. St. 326. And see *Wells, J., in Marshall v. Berry*, 13 Allen, 43.

⁴ *Meach v. Meach*, 24 Vt. 591.

of one's whole personal property is void, what exact proportion thereof will be transmissible?

But the two cases which thus antagonize in principle differed considerably in fact. Both were American cases, and decided at about the same time: the one, in 1851, in Pennsylvania; the other, soon after, in Vermont, in 1852. In the Pennsylvania case, the disposition set up as a gift *causa mortis* was to a sister-in-law, as against the next of kin, and consisted of clothing, various articles of jewelry, trunks, teaspoons, a promissory note, and a bank-book; all of which a dying woman was claimed to have fully given by merely handing over keys, and saying to this donee, "All that I have is here, and all is yours;" or other words to that effect. The attempt to establish a will utterly disinheriting kindred by little else than a donor's word of mouth could hardly have been more palpable. On the other hand, the Vermont case presented a disposition from husband to wife, which was clearly evidenced by a deed of gift carefully expressed and executed in a most deliberate manner; and there are intimations in the opinion that the delivery was yet more formal. These cases might, perhaps, be reconciled, as concerns the present inquiry, by the suggestion that distinct articles of value and distinct species of personal property, requiring in themselves different modes and acts of delivery, are not to be considered as embraced in one single contemporaneous disposition by way of gift *causa mortis*, where the evidence of perfect and deliberate intention on the donor's part, accompanied by suitable delivery, is not conclusive; that, as a general rule, complex dispositions by a gift *causa mortis*, whether of various distinct species of property made all to a single person, or of sundry chattels made among various individuals, on a single occasion, are not favored, because too closely resembling informal wills, especially if the effect be to greatly prejudice the rights of widow, husband, and next of kin; and that such involved and sweeping gifts, if sus-

tainable at all, are only so on clear evidence of a sound and disposing mind and memory in the donor amounting to testamentary capacity, of freedom on his part from fraud and undue influence, considering all the surroundings, and of suitable acts of delivery, applied according to the subject-matter to the several species of property and the several donees. For gifts *causa mortis*, if admissible to the extent of disposing of the whole or the greater part of one's personal estate, are accompanied by legal formalities so slight that they call for little favor when they purport to dispose in the mass of that which should either be specifically separated and delivered, or else bestowed by a will duly executed.¹ But

¹ In thus intimating the opinion that a gift *causa mortis* may be good in some cases, notwithstanding it in effect disposes of all one's personal property, we do not mean to sustain the views of Chief Justice Redfield in *Meach v. Meach*, 24 Vt. 591 (which presents some peculiar aspects for consideration elsewhere), utterly, and without qualification, as against those very clearly and sensibly expressed in *Headley v. Kirby*, 18 Penn. St. 326; but rather to reconcile the cases, if possible, hold fairly to the authorities of the past, and treat the question as one which has not yet been passed upon by the courts in all its bearings. One great objection to such gifts is, that where they amount to a full disposition they are apt to be complex, as was certainly true of *Headley v. Kirby*, which we believe to have been rightly decided on its general merits. But is a gift *causa mortis* of the whole necessarily more complex than of part of one's property? A man owning a large fortune might give away mortgages, notes, bonds, and furniture, amounting to perhaps a quarter part of what he owned, and yet the gift would be quite as complex as in that before the Pennsylvania court. On the other hand, if the dying woman had there deliberately handed her clothing to A., her jewelry to B., the promissory note to C., and so on, with appropriate acts of delivery in each case, on what principle could it have been asserted that A., B., C., and the rest had not each a valid gift *causa mortis*? or that A.'s gift, B.'s gift, or C.'s gift would have been valid, if nothing had been given to D.? or if, again, the donor had held back the teaspoons, and given the rest of the things, one by one, to A.?

But as to the general impolicy of sustaining these extensive dispositions, or perhaps gifts *causa mortis* at all, without the solemnities attending wills, that is a different matter. And on this issue the language of the court in *Headley v. Kirby* is well worth quoting: "The gift in the case before us professes to embrace all the donor's property, and to be made in

the fact that such gift constitutes the principal part, or, indeed, almost the whole, of the donor's property, will not, it is held, necessarily prevent it from taking effect.¹

A gift *causa mortis* is confined to personal property, and, from the nature of the transfer, cannot extend to real estate.² It embraces, of course, every species of corporeal personal property, — such as furniture, books, money, gold-dust, and the like.³ But as to incorporeal personal property, the law has undergone changes. Originally a gift *causa mortis* could only be made of chattels which passed by manual delivery; then bank-notes, lottery-tickets, and notes regularly indorsed or payable to bearer, were added; still later, on the principle of assignment, bonds, and choses in action generally; and at length, consistently with the liberal doctrines of equity elsewhere noticed, various kinds of incorporeal chattels, where the written muniment of title was passed over with the intention of transfer, though without full legal formalities, — as in the case of bills, notes, certificates of deposit, or bonded securities wanting a legal indorsement.⁴ It would be useless

prospect of death, and is therefore a will, if it receive the sanction of law. . . . This case is so entirely peculiar in its character, that if we take our statute of wills as the general rule for such dispositions, as we are bound to do, and treat the cases of *donationes mortis causa* as exceptions which are not to be extended by way of analogy, then we are clear of all embarrassment as to the principle on which the case is to be decided. It is not pretended that any gift like this has ever been held good; and it may be safely declared that no mere gift made in prospect of death, and professing to pass all one's property to another, to take effect after death, can be valid under our statute of wills, no matter what delivery may have accompanied it. If this is not true, then it is plain that the statute of wills, so far as it is intended to exclude all modes of disposing of personal property at death, which it does not provide for, is repealed by the decisions of the courts."

¹ Michener v. Dale, 23 Penn. St. 59. This case tends to limit the doctrine of Headley v. Kirby, *supra*.

² Bouv. Dict. *Donatio Mortis Causa*; Meach v. Meach, 24 Vt. 591.

³ Michener v. Dale, 23 Penn. St. 59.

⁴ Duffield v. Elwes, 1 Bligh, N. S. 497; Rankin v. Weguelin, 27 Beav. 309; McConnell v. McConnell, 11 Vt. 290; Southerland v. Southerland,

to attempt to reconcile the earlier and later authorities in this respect; for in the matter of delivery there has been a steady progression in favor of aiding a donation intent imperfectly executed, whether the gift be *inter vivos* or *causa mortis*.¹

So great is the change which equity has wrought in the law of delivery, that a bond or note secured by mortgage, which formerly could not be the subject of a gift *causa mortis* at all, is now, by the law both of England and America, held to be transferable in this manner, notwithstanding the non-observance of full formalities.² And so may a policy of insurance on the donor's life be given away *causa mortis*.³ Also shares of stock, though not, according to some authorities, without a regular transfer before the donor's death.⁴ Also, subject to possible formalities of delivery, a savings-bank deposit.⁵ And the obligation of the donee himself is, like that of any stranger, a suitable object of gift; such gift amounting to a forgiveness of the debt.⁶ In short, any chose in action, or chattel incorporeal, short of the donor's own obligation, appears now capable of being made the subject of a gift *causa mortis*.

As the gist of the rule lies in the capability of the thing for a complete delivery by way of gift, we shall recur to this subject more in detail under methods of execution.

5 Bush, 591; 2 Kent, 447; Chase v. Redding, 13 Gray, 418, *per* Shaw, C. J.; Waring v. Edmonds, 11 Md. 424; Lee v. Boak, 11 Gratt. 182; Gardner v. Gardner, 20 Wend. 526; Bates v. Kempton, 7 Gray, 382; Westerlo v. DeWitt, 36 N. Y. 340. But see Overton v. Sawyer, 7 Jones L. 6.

¹ See cases as to delivery, *supra*, c. 2, and *infra*, c. 5.

² Duffield v. Elwes, 1 Bligh, N. S. 497, overruling s. c. 1 Sim. & Stu. 239; Brown v. Brown, 18 Conn. 410; Hurst v. Beach, 5 Madd. 351; Chase v. Redding, 13 Gray, 418. ³ Witt v. Amis, 1 B. & S. 109.

⁴ Cf. Lambert v. Overton, 13 W. R. 227; Moore v. Moore, L. R. 18 Eq. 474; with *supra*, c. 2; Grymes v. Hone, 49 N. Y. 17.

⁵ See, as to delivery, *infra*.

⁶ Lee v. Boak, 11 Gratt. 182; Moore v. Darton, 4 De G. & Sm. 517.

But this limit is placed to gifts *causa mortis* of incorporeal chattels, that the donor's own promise, whether in the shape of promissory note, unaccepted bill, or contract generally, given in the prospect of approaching death, and only to take effect at or after his death, is not a valid gift *causa mortis*. This point is at last settled by numerous authorities.¹ For the practical result of sustaining such an executory contract would be to enable a dying man to make informal disposition of his estate by creating in favor of his friends, at pleasure, debts, without a shadow of legal consideration to uphold them. Nor is a draft or check on his own funds, unaccepted and unhonored by the person or depositary upon whom it is drawn, any more than would be a delivery-order upon an agent who failed to deliver before his authority was revoked, a valid gift *causa mortis*; and this, no matter what bank-book or other voucher may have accompanied such draft or check as a mere accessory and not the principal thing.² In other words, the only kind of incorporeal property which a donor may thus give away is that which subsists at his death, as in some sense a third party's obligation to the donee, or perhaps the donee's own obligation, which the donor meant to surrender, but never the mere obligation of the donor himself.

This doctrine has not always prevailed, however. In the early New York case of *Wright v. Wright* a precisely opposite view was entertained.³ But in one State after another that decision has since been questioned, and *Harris v. Clark*, decided in 1849 by the New York Court of Appeals,

¹ *Flint v. Pattee*, 33 N. H. 520; *Parish v. Stone*, 14 Pick. 198; *Raymond v. Sellick*, 10 Conn. 480; *Brown v. Moore*, 3 Head, 671; *Smith v. Kittridge*, 21 Vt. 238; *Starr v. Starr*, 9 Ohio St. 74; *Harris v. Clark*, 3 Comst. 93, overruling *Wright v. Wright*, 1 Cow. 598; *Gough v. Tindon*, 8 E. L. & Eq. 507.

² *Bank v. Williams*, 13 Mich. 282; *In re Beak's Estate*, L. R. 13 Eq. 489; *Harris v. Clark*, *supra*; *McKenzie v. Downing*, 25 Geo. 669.

³ *Wright v. Wright*, 1 Cow. 598.

upsets it entirely.¹ The English cases now fully establish the same rule; not, however, without bringing into discredit the early case of *Lawson v. Lawson*, which sustained as a gift *causa mortis* a bill drawn upon a goldsmith by a dying husband, to pay £100 to his wife to buy her mourning, — Lord Loughborough's later suggestion, that the drawing of the bill was in the nature of an appointment, being hardly satisfactory.²

Let us examine this doctrine, with its reasons, somewhat in detail, since the occasion for any such exception to the general rule of gifts *causa mortis* is not at first glance apparent. Lord Loughborough, in *Tate v. Hilbert*, appears to have led the way; deciding that where a person, in his last illness, gave to one donee his promissory note for a sum of money, and to another a check on his banker, payable to bearer, which was not realized before his death, neither gift was good.³ For the one, he held, was no transfer of property, but a promise; while the other was meant to take effect presently through an agent whose authority was revoked by the giver's death. Though Lord Loughborough held to old-fashioned views concerning the delivery of negotiable paper, this decision would still be justified, and fairly too, upon these grounds. And to much the same purport is the language of Romilly, M. R., as recently as 1868, in *Hewitt v. Kaye*, where the principle is more fully elucidated, with references to later English cases: "When a man on his death-bed gives to another an instrument, such as a bond or promissory note, or an I. O. U., he gives a chose in action, and the delivery of the instrument confers upon the donee all the right to the chose in action arising out of the instrument. But a

¹ *Harris v. Clark*, 3 Comst. 93; *Flint v. Pattee* and other cases cited *supra*.

² See *Lawson v. Lawson*, 1 P. Wms. 441, as explained in *Tate v. Hilbert*, 2 Ves. Jr. 111, 121.

³ *Tate v. Hilbert*, 2 Ves. Jr. 111. And see *Holliday v. Atkinson*, 5 B. & C. 501.

check is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing."¹ Here a testatrix had given a check at night, and died in the course of the night, and before the check could be presented for payment. And the same rule as to checks and drafts is reaffirmed in a later case, where a donor in his last illness accompanied the gift by a delivery of the banker's pass-book.²

We are not to understand the language of Romilly, M. R., above quoted, concerning bonds, promissory notes, and I. O. U.'s, as tending to sustain a donor's own obligations, as distinguished from his checks; for this would be contrary to the current of authorities.³ Nor does *Amis v. Witt*, where the delivery of a banker's deposit-note was upheld, militate against the general principle that a donor's own promissory note or bare promise, by whatever writing evidenced, cannot be the subject of his gift *causa mortis*.² So that the latter continues, doubtless, the law of England, although the recent English decisions bear more directly upon the validity of a donor's checks and drafts.

Turning to the American decisions, we find this later doctrine asserted with more positiveness; indeed, vigor and breadth of application usually distinguish the American decisions on this whole subject of modern incorporeal gifts from those more tentative and cautious of the English equity courts, — their judges, with an inborn reluctance to cut loose from the old precedents, seeking too often to reconcile the irreconcilable, while ours overturn whatever precedents are in the way, and face squarely to the front. The Massachu-

¹ *Hewitt v. Kaye*, L. R. 6 Eq. 198.

² *Beak v. Beak*, L. R. 13 Eq. 489.

³ Cf. *Hewitt v. Kaye*, *supra*, with *Tate v. Hilbert*, 2 Ves. Jr. 111; *Gough v. Tindon*, 8 E. L. & Eq. 507; *Holliday v. Atkinson*, 5 B. & C. 501.

setts case of *Parish v. Stone* is a leading case to the point that a donor's own promissory note, payable to the donee's order, cannot be the subject of a gift *causa mortis* ; for it was not, in effect, as the court reasoned, a gift of the money represented by the writing. And it made no difference that the donor intended a death-bed gift ; not even that his object was the praiseworthy one of equalizing the distribution of his estate.¹ And the courts of Connecticut and Vermont were prompt in pronouncing against the same dangerous donations.² For, as was urged by Judge Waite, as early as 1835, in *Raymond v. Sellick*, putting the decision on the vantage-ground of public policy, if notes executed by a man in his last illness, and without consideration, were binding upon his estate, a new method would be devised of disposing of estates without the formalities of wills ; and serious consequences might follow.³ In the later Vermont case of *Smith v. Kittridge*, the court, upon full deliberation, refused to sustain a promise to pay to one's order so much money, "to be paid out of my estate after my decease." For it was in no sense a gift *causa mortis* ; nor could it be supported as a contract between the parties, or a debt against the testator ; the intention of the dying man was to make it a legal claim in another's favor against his estate, on the mere consideration of love and affection, which is not enough to create a valid obligation, either at law or in equity.⁴

So with a giver's unaccepted checks and drafts, the present drift of the American decisions is equally plain. *Harris v. Clark* is a leading New York case on this point. A draft was made upon parties in a distant city, who had funds of the donor in their hands ; the donee indorsed it, but, before

¹ *Parish v. Stone*, 14 Pick. 198. .

² *Raymond v. Sellick*, 10 Conn. 480; *Holley v. Adams*, 16 Vt. 206.

³ Waite, J., in *Raymond v. Sellick*, 10 Conn. 480.

⁴ *Smith v. Kittridge*, 21 Vt. 238.

the drawees had accepted, the donor died. The intention being that the gift should take effect only in case of the donor's death, the transaction could not be upheld as an ordinary gift; nor, being a sort of executory promise, would the court sustain it as a gift *causa mortis*.¹ The same rule was applied some fifteen years later, in a Michigan case, where one *in extremis* drew his check upon a bank, with directions to the payee to defray the drawer's funeral expense out of it, and to pay the balance to his heirs. The check had not been accepted at the bank when the drawer died. Says Christiancy, J.: "Without acceptance by the bank, or some special undertaking on its part, we do not think the bank could be held liable upon a check, as such, to the payee. There is no privity of contract between the payee and the drawee; and if the money is not paid upon the check, the drawee is only accountable to the drawer."²

But as to bills of exchange, drafts, checks, and orders generally, the acceptance of the instrument by the drawee gives the transaction a new character; and as it might then be said that the agent had completed the required transfer for his principal, or that there was an obligation of a third party, as a chose actually delivered before the donor's death, any such instrument thus accepted before the donor's death becomes the valid subject of a gift, and goes into effect under the usual conditions.³ But if such acceptance be not made until after the donor's death, it should not in reason suffice; though there are exceptional instances, as it appears, where the gift would not be suffered to fail through the default of the drawer or third party, when the donor and donee had done

¹ Harris v. Clark (A. D. 1849), 3 Comst. 93.

² Bank v. Williams (A. D. 1865), 13 Mich. 282, 291.

³ See Harris v. Clark, and Bank v. Williams, *supra*; Bromley v. Brunton, L. R. 6 Eq. 275; Boutts v. Ellis, 17 Beav. 121; s. c. 4 De G., M. & G. 249.

all that was needful on their part to enable the gift to take effect.¹

(3.) As to expectation of death. Here has been found some conflict of opinion; but the English and American authorities, on the whole, appear to have settled down to a clear, uniform, and reasonable doctrine. Whatever discrepancy may have existed in the past, is to be attributed mainly to the attempt to conduct the broader analogies of the Roman law into our own jurisprudence. The Institutes of Justinian did not regard it as necessary that the donor should be in imminent danger of death: it was enough if he were moved by the general apprehension of death, as the common lot of humanity. Hence was it said that the intention should be expressed in such gifts; "as that the donor is sick, about to travel, or engage in war, or at a time of epidemic or general pestilence, or on account of the general frailty of human nature."² But while motives so liberal might have influenced the donor, the donation, at the civil law, became *ipso facto* void, if the donor was fortunate enough to escape the anticipated danger.³

In this last respect we indeed follow the civil law; but, according to the decided weight of authorities, no such wandering and indefinite expectation of death is available for gifts *causa mortis* in the law of England and America. This will appear from a rapid review of the authorities.

The early inclination of the English courts was plainly to treat the gift *causa mortis* as a strict death-bed disposition.

¹ See *Bromley v. Brunton*, *supra*; *Boutts v. Ellis*, 17 Beav. 121; s. c. 4 De G., M. & G. 249. It is intimated in *Harris v. Clark*, 3 Comst. 93, that a draft accepted *before* or *after* the donor's death would have operated. As concerns acceptance in the latter contingency, this *dictum* seems to be an incorrect one. See *supra*, pp. 82, 83, as to gifts *inter vivos* under similar circumstances.

² See Colquhoun Roman Law, § 1071; Inst. lib. 2, tit. 7.

³ *Ib.*

“Last illness” is the expression of the older cases; and in Blackstone this “death-bed disposition” is spoken of as made by “a person in his last sickness, apprehending his dissolution near.”¹ In one of the early cases, *Eyre, C. B.*, seems to have gone so far as to declare that there must be positive evidence that the gift was made in the last illness: this, however, is too broad a statement.²

“Peril of death” is another expression, favored apparently at a somewhat later period, — this suggesting an enlargement of the old doctrine; that one need not be literally on his death-bed, but might make the gift whenever *in extremis*; as, for instance, if exposed to death by shipwreck, or an approaching battle. So, too, came into later use such expressions as “expectation of death,” or “contemplation of death.”³ But as the idea of such a donation expands, the question presses, Is it the actual circumstance of approaching death, or the donor’s own apprehension of death which seems to approach, that shall most truly determine the character and validity of the gift? That the circumstance of approaching death alone is insufficient, a moment’s reflection would show. Intention enters as an element into every transaction. And a gift should not be other than of the ordinary kind, if made by a man well, and fearing nothing, though a shot from an assassin’s pistol might send him into eternity a moment later.

As the law stood about half a century ago, there was too much inclination, among eminent jurists, to react, so as to specially favor the donor’s apprehension in gifts *causa mortis*; and it had become clear by this time that the

¹ 2 Bl. Com. 514. And see *Gardner v. Parker*, 3 Madd. 184; *Lawson v. Lawson*, 1 P. Wms. 441.

² *Eyre, C. B.*, as reported in *Blount v. Burrow*, 1 Ves. Jr. 546. But this *dictum* is not found in the other report, 4 Bro. C. C. 72. See 1 Wms. Ex’rs, pt. 2, bk. 2, c. 2, § 4, n.

³ Story Eq. Jur. §§ 606, 607; *Roper Legacies*, 26; 1 Wms. Ex’rs, pt. 2, bk. 2, c. 2, § 4; *Duffield v. Elwes*, 1 Bligh, n. s. 497, 530; *Tate v. Leithead, Kay*, 658; *Gardner v. Parker*, 3 Madd. 184.

Roman law contemplated not only one's illness, but his infirmity or old age, or external or anticipated danger, as conditions which admitted of such donations. Hence Chancellor Kent's statement of the law of gifts *causa mortis* was loose. "It is essential to them," he says, "that the donor make them in his last illness, or in contemplation and expectation of death;" and he then proceeds to point out the conditions above noticed, under which an apprehension of death might arise, in accordance with the Roman law.¹ A reader might thus have supposed — whether the learned instructor so designed it or not — that either (1) a circumstance, — namely, last illness, — or (2) a general contemplation of death, was, of itself, unaided by the other, enough to clothe a transfer with the incidents of a gift *causa mortis*, — a position which is certainly incorrect. And about the time these Commentaries became the recognized standard of American law, was decided, in Pennsylvania, the case of *Nicholas v. Adams*, wherein the law of gifts *causa mortis* was ably reviewed by Chief Justice Gibson, and at a period favorable to ranking this among the American leading cases on the subject.² Here the issue with the older decisions is fairly met, and the time-honored opinion refuted, that gifts *causa mortis* have exclusive reference to death-bed sickness. The definition of Justinian's Institutes, he observes, is, "*quæ propter mortis fit suspitionem*,"³ — not a word about sickness. It is indifferent, he proceeds to say, whether the peril of death be induced by sickness, or any other cause. Thus, the peril past, the gift of a soldier or malefactor might be retracted, though made in perfect health, when going to execution or to battle. So far the Chief Justice had reasoned well; but in the next statement he conveyed a misapprehension, which later courts have been put to some pains in rectifying. "A groundless appre-

¹ 2 Kent Com. 444. And see Roper Legacies, 26.

² *Nicholas v. Adams* (A. D. 1836), 2 Whart. 17.

³ *Supra*, p. 125.

hension of death," is his language, "is necessarily as operative to make a gift conditional as if the danger were real." "I would, therefore," he adds, "briefly define a *donatio causa mortis* to be a conditional gift, dependent on the contingency of expected death."¹

It is not so much with regard to the facts on which the court passed in the foregoing case, — for the gift in question had been made only some three weeks before his death, by one laboring under a complication of consumption and paralysis, from which he died, — as in the loose views enunciated by one so eminent as Chief Justice Gibson, concerning the expectation of death essential to a gift *causa mortis*, that later American courts have felt compelled to review the decision and pronounce it unsatisfactory. For if the only requisite be that the donor has some vague and groundless apprehension of death in mind at the time of giving, how many gifts *inter vivos* might afterwards be recalled by the giver, on the plea that a condition had been annexed which failed. Or, if he died at last, how often would a simple resulting trust for the donor have to be turned into a gift *causa mortis* by construction, merely because of that general contemplation of death, accompanying the transfer, which prompts any prudent man to sit down and pen his will, while hoping and meaning to enjoy his worldly goods many years longer. The drift of argument in this case was to set up that one may, under a misapprehension of approaching death, or with a general reference to some hazardous exposure, make a gift *causa mortis*; and though he recover from that attack, or escape from that peril, and die afterwards from another cause, or in some manner but dimly apprehended as possible when he made the gift, the exit of life shall so relate back to the donor's misapprehension, or imperfect apprehension, as to make the transfer a good one *causa mortis*.

¹ See remarks by Woodward, J., in *Michener v Dale*, 23 Penn. St. 59, criticising *Nicholas v. Adams*, *supra*.

In a number of late American cases, where the attempt was made to push the doctrine of *Nicholas v. Adams* to its legitimate consequences, the element of death has been restored by the courts to its proper place. Thus, a soldier going to the front, and with that general foreboding of the uncertainties of life to which an active campaign may expose him, puts a sum of money or some other chattel into the hands of a friend, saying, "I give you this; it is your own in case I never return;" or, "Give it to A. as hers if I never return;" or using some other expression of like purport. This comes within the rule of an enlarged peril of death, to be sure. But is any such twilight expectation of death, between dawn and day, enough to base a gift *causa mortis* upon? The soldier may come home safely, or he may die a natural death while away; the seeds of disease may already be in his system, and the fatal malady that which he would never have contracted in the service; even if killed, it may be from an accidental discharge of his own gun, or in a railway car, and not necessarily from wounds received in battle, or even from an enemy's gun. Rightly, then, is it determined that such transfers cannot stand as gifts *causa mortis*; but that the giver should have the particular cause of death clearly at hand, and make his gift with an especial reference to its mortal issue.¹ And

¹ *Gourley v. Linsenbigler*, 51 Penn. St. 345; *Dexheimer v. Gautier*, 5 Rob. (N. Y.) 216; *Irish v. Nutting*, 47 Barb. 370; *Smith v. Dorsey*, 38 Ind. 451; *Linsenbigler v. Gourley*, 56 Penn. St. 166; *Craig v. Kittredge*, 46 N. H. 57. The opinion of the court in *Irish v. Nutting*, *supra*, is full and exhaustive. Here it was said, by Bacon, P. J.: "In view of the decisions, and the principle which runs through them all, I think it is impossible to maintain the gift in this case as a *donatio mortis causa*. The element of illness, in any degree, does not enter into the case, nor does it come within the category of the conceived near approach of death from an impending or apprehended peril."

So in *Gourley v. Linsenbigler*, 51 Penn. St. 345, Read, J., says (1865): "It is evident that the language used by the authorities in speaking of 'in contemplation of death,' 'in expectation of death,' or 'in appre-

the same principle applies where one makes a transfer in contemplation of a hazardous journey.¹

But an apprehension of approaching death from old age and failing health may justify a gift *causa mortis*. A transfer of this kind was sustained in a recent New York case, where the giver, a man about eighty years old, was in failing health, and so continued until he died from the cause apprehended.²

While the English cases seem never to have dwelt upon that extension of the causes of death which the phrase "peril of death" would seem to imply, but rather to have viewed gifts *causa mortis* as made in sickness, they certainly justify no such gifts when made under a vague and uncertain apprehension of death. These two ideas are kept together as coexistent, by the best of the later judges, — extremity of sickness, and contemplation of death therefrom.³ Says Lord Eldon, in 1827: "Nothing can be more clear than that this *donatio mortis causa* must be a gift made by a donor in contemplation of the conceived approach of death."⁴ Lord Cottenham, in a later case, would not sustain a gift *causa mortis* where the evidence did not show that the transaction took place while the donor was in such a state of illness or expectation of death as would warrant a supposition that the gift was made in contemplation of that event.⁵ And in 1852

hension of death,' — applies to the cases of illness ending in death, the last illness which makes it a death-bed disposition."

But see *contra*, *Gass v. Simpson*, 4 Cold. 288 (1867), which appears to have been wrongly decided on the facts. Milligan, J., dissents. Even here it is admitted that "a general apprehension of death from the mortality of man will not be sufficient."

¹ *Walden v. Dixon*, 5 Monr. 170. That such transactions cannot stand as gifts *inter vivos* has already been seen, *supra*, p. 119.

² *Grymes v. Hone*, 49 N. Y. 17.

³ See Sir John Leach, in *Gardner v. Parker*, 3 Madd. 185; *Duffield v. Elwes*, 1 Bligh, N. S. 497; *Edwards v. Jones*, 1 Myl. & Cr. 235; *Staniland v. Willott*, 3 Mac. & G. 664.

⁴ *Duffield v. Elwes*, 1 Bligh, N. S. 497.

⁵ *Edwards v. Jones*, 1 Myl. & Cr. 235. And see the language of Tate

a gift made by one in the apprehension of death from epilepsy was decided not to remain subject to the further uncertainties of precarious health following the attack, after the immediate peril which occasioned the transfer had passed away.¹

It is true, however, in a certain limited sense, that a groundless apprehension of death may render a gift conditional on death; the situation thus offered being that one in immediate danger of death gave with this particular exigency in view; and as a consequence of his recovery therefrom, the gift *causa mortis* is defeated by the condition of death not happening. Such being the case, and the original apprehension proving groundless, it is immaterial that death follows sooner or later from a cause not proximately regarded in the gift. Thus was it in the English case of *Staniland v. Willott*, where the gift *causa mortis* was made when the donor was in peril, and apprehended death from an epileptic attack; and then failed, because he had recovered, after a month's illness, sufficiently to manage his affairs and go abroad, though fairly insane by the time the property was reclaimed on his behalf from the donee.² And some ten years earlier it was decided in this country, upon a like principle, that where the moving cause of such a gift is consumption at a certain critical stage, and this crisis passes away so as to enable the giver to attend once more to his ordinary business, for several months, there is a gift *causa mortis*, which fails, notwithstanding the giver dies of consumption afterwards.³

Whether a gift was made under such circumstances of

v. Leithead, Kay, 658 (1854): "A *donatio mortis causa* can only be established by a necessary implication, or an expressed intention that the gift should not take effect except in the event of the death of the donor."

¹ *Staniland v. Willott*, 3 Mac. & G. 664.

² *Staniland v. Willott*, *supra*.

³ *Weston v. Hight*, 17 Me. 287. The court inaccurately observes, "This is not a case of *donatio causa mortis*." It was, however, a gift *causa mortis*, failing because of the primary condition annexed to all such gifts.

expected death, as to bring it within the rule of gifts *causa mortis*, is mainly a question of fact to be determined by the proof. But so far are the courts indulgent, that wherever the gift was made in the donor's last illness, and a few days or weeks before his death, it will be presumed a gift *causa mortis*, and not *inter vivos*.¹ But this presumption is not conclusive, and cannot prevail against manifest intention to the contrary.² Where the gift was actually made in the giver's last illness, its conditional character will be taken for granted ; and it is for those who would dispute that character to show, that, on the contrary, something was said or done to indicate that it should become absolute and irrevocable without reference to death.³

In determining issues of this kind, the surrounding circumstances will afford much aid as to the donor's intention. Thus the gift *causa mortis* should have been contemporaneous with the peril ; and a dying man's statement that he has made a gift on some former occasion, which he does not specify, is insufficient to establish such a gift.⁴ Nor can directions given by a person in rapidly failing health, which substantially amount to the substitution of an agent to collect and manage in his stead so long as his condition continues unfavorable to the regular transaction of business, be subverted into a gift *causa mortis* to the agent, the principal dying shortly after : first, because no gift was intended ; and, next, because the contemplation was sickness and disability, not death.⁵

The general conclusion reached as to the element of ex-

¹ Gardner v. Parker, 3 Madd. 184; Lawson v. Lawson, 1 P. Wms. 441.

² Thompson v. Thompson, 12 Tex. 327; Candor's Appeal, 27 Penn. St. 119; Allen v. Polereczky, 31 Me. 338.

³ 1 Wms. Ex'rs, pt. 2, bk. 2, c. 2, § 4; 3 Redf. Wills, 2d ed. 326; Gardner v. Parker, *supra*.

⁴ Hebb v. Hebb, 5 Gill, 506. And see Thompson v. Thompson, 12 Tex. 327.

⁵ First Nat. Bank v. Balcom, 35 Conn. 351.

pectation of death in gifts of personal property *causa mortis* is this: It is not enough that the peril of death be near, or that the giver make the transfer under some general misapprehension, or vague and imperfect apprehension, of approaching dissolution. The special circumstance and its apprehension by the donor himself as a condition must coexist. But if, being in immediate peril of death,— we should say from any cause, though the English decisions seem to be thus far confined to cases of sickness,— one makes a gift under the apprehension that such peril will fatally terminate, the gift is *causa mortis* ; and hence, following the rule of such gifts, if he recovers from that peril the gift is void, while if he dies in consequence the gift is complete,— subject, of course, to other conditions, to be noticed elsewhere. In other words, and to recur to our original definition, the gift *causa mortis* must be made by a party in the expectation of a death then imminent. But, as we have also shown, while the peril and the apprehension of death from the peril are coessential, the courts will presume the latter, or the conditional intent, from the former, or the peril, under suitable circumstances, though not in the face of opposing testimony.

CHAPTER V.

GIFTS CAUSA MORTIS ; HOW EXECUTED.

(4.) As to the method of executing a gift *causa mortis*. To this important topic the present chapter will be devoted.

Directing our attention first to the requisite acts on the part of the donor, we come at once upon the essential of delivery. That no gift *causa mortis* can take effect without delivery, our courts and writers have strongly insisted upon, ever since Lord Hardwicke first declared emphatically for the principle as a cardinal one in English law, whatever might have been the practice under the Roman emperors.¹ Blackstone says that in this species of gifts the giver "delivers or causes to be delivered to another the possession."² "To substantiate the gift," are the words of another, "there must be an actual tradition or delivery of the thing to the donee himself, or to some one for the donee's use."³ Story says there can be no valid donation unless there be an actual delivery of the subject of the donation.⁴ And the courts quite frequently instance delivery as one of the leading qualities wherein our gifts *causa mortis* differ widely from the corresponding donations of the civil law.⁵

Again, it seems to have been steadily insisted that de-

¹ Ward v. Turner, 2 Ves. Sen. 436.

² 2 Bl. Com. 514.

³ 1 Wms. Ex'rs, 7th Eng. ed. 774; Drury v. Smith, 1 P. Wms. 404; Irons v. Smallpiece, 2 B. & Ald. 551.

⁴ Story Eq. Jur. § 611-613.

⁵ See, e. g., the opinion in Irish v. Nutting, 47 Barb. 370.

livery once given by the donor, the donee's possession and control, or that of the person vested with the title for his use, must go on uninterrupted to the donor's death ; since the presumption would be, if the donor afterwards resumed possession, that he had revoked the gift during his life, as any donor *causa mortis* has a right to do.¹

Now this element of delivery, which we are to consider at length, takes the common-law gift *causa mortis* quite away from legacies, and associates it with the ordinary gift. Of the many decisions, often contradictory, which are embraced under the present head of delivery, there are few that might not interchange with gifts *inter vivos* ; the requisites of execution correspond ; similar windings are traceable in the law ; the ancient stiffness for manual delivery likewise yields place for the modern equitable assignment ; and to elaborate this chapter is like running a parallel with a former one.² But while the analogies might serve for mutual aid in legal investigation, it is better, on the whole, for gifts *causa mortis* and gifts *inter vivos* to be treated separately.

Here, as in the case of a gift *inter vivos*, promises to give are to be disregarded for the want of consideration ; and a promise on one's death-bed to give at his death confers of itself no legal right or title.³

For corporeal chattels, manual delivery is required. The money, the jewel, the watch, the goods generally, should be handed over by the donor to the donee, or other person for him, — the method of delivery varying somewhat, according to the subject-matter.⁴ And as bank-notes circulating as cash

¹ Ward v. Turner, 2 Ves. Sen. 431; Irish v. Nutting, *supra*; Hatch v. Atkinson, 56 Me. 324.

² *Supra*, c. 2, p. 72 *et seq.*

³ Chevallier v. Wilson, 1 Tex. 161; Coleman v. Parker, *infra*, p. 146.

⁴ Ward v. Turner, 2 Ves. Sen. 431; 2 Bl. Com. 514; Westerlo v. De Witt, 36 N. Y. 340; Michener v. Dale, 23 Penn. St. 59.

are in effect substantial corporeal property, like money, a gift *causa mortis* of such chattels has from an early period prevailed when accompanied by the usual manual delivery.¹

When the property, from its peculiar nature or situation, does not admit of corporeal delivery, — as in the case of bulky articles, or goods stored away, — the delivery of a symbol may suffice for a gift *causa mortis*, if such delivery be otherwise consistent with the owner's intention to give. Thus, the delivery of a key to a wine-cellar may amount to delivering possession of the wines, "because it is the way of coming at the possession, or to make use of the thing;" in other words, such a delivery is tantamount to actual delivery, for the purpose of a gift.²

But the rule of delivery is not so readily applied where the gift is of the receptacle sort. In cases so simple as a box of jewelry or a purse of money, to be sure, delivery of the thing could hardly fail to carry the contents.³ But an intention of giving is not so readily manifested when the dying owner delivers the key of some trunk or wardrobe which yet remains standing near his bedside, and within his control. And the rule of chancery appears to be well settled, that there can be no sufficient delivery of one thing *causa mortis* solely as the symbol or representative of another: of a key, for instance, in the place of the receptacle to which it belongs, and which itself might have been handed over.⁴

The real question is, whether the donor has intentionally parted with his dominion of the property; and we must view his acts accordingly. Thus, in *Powell v. Hellicar*, the dying person told A. to take the keys of a dressing-case and box containing a watch and trinkets, and immediately on her death to deliver the watch and trinkets to B.; and it was

¹ *Drury v. Smith*, 1 P. Wms. 404; *Miller v. Miller*, 3 Atk. 356; *Hill v. Chapman*, 2 Bro. C. C. 612; 1 Sch. Pers. Prop. 455.

² *Hardwicke, L. C.*, in *Ward v. Turner*, 2 Ves. Sen. 443; *Jones v. Selby*, Prec. Ch. 300; *Smith v. Smith*, Str. 955.

³ *Michener v. Dale*, 23 Penn. St. 59.

⁴ 2 Kent Com. 446; *Ward v. Turner*, *supra*; *Powell v. Hellicar*, 26 Beav. 261.

decided that there had been no complete gift; for, though A. immediately took the keys and kept them in her sole custody, as requested, the box and dressing-case remained under the alleged donor's control.¹ So was the delivery with intent to give wanting in *Reddel v. Dobree*, — another English case, — there being much roundabout over a locked money-box, the alleged donor keeping control of the key all the while, and only letting the party to whom he delivered the box keep it subject to his occasional orders. This was, at best, but a gift of what might happen to be in the box when the donor was done using it; or, as Vice-Chancellor Shadwell observed, the transaction from beginning to end was nothing more than putting one to a certain extent in possession of the box, while retaining the power over the contents.²

The same principle has been recognized in the courts of this country. Thus, in a Maine case, where the gift claimed was of money and public securities contained in a trunk; and the owner, instead of handing the property over, locked the trunk and kept it in his own closet until his death, — the donation was held to have been imperfect. Nor was the delivery of the key to the trunk allowed to carry the contents as symbolical or constructive. "It is well settled," observed the court, "that delivery of the key of a trunk, chest, or box, in which valuable articles are kept, which are capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles. The rule is, that the delivery must be as perfect and complete as the nature of the articles will admit of."³ And in *Coleman v. Parker*, decided in Massachusetts in 1874, the facts

¹ *Powell v. Hellicar*, 26 Beav. 261.

² *Reddel v. Dobree*, 10 Sim. 244. And see *Farquharson v. Cave*, 2 Coll. 356.

³ *Hatch v. Atkinson*, 56 Me. 324. And see *Headley v. Kirby*, 18 Penn. St. 326. But cf. *Cooper v. Burr*, 45 Barb. 9, where the court appears to have strained the facts somewhat to support the gift.

showed that the dying person did not give up the control and actual dominion either of the trunk or the key, nor make any genuine change of possession. The evidence established that A., who was at the point of death, asked B. to take some dresses out of the closet and put them in her trunk, and to lock the trunk and put the key in a washstand she used; this was done; and A. told B. that she wanted C. to have the trunk if she died, and wanted B. to see that C. got it. The words would seem to have indicated the purpose of making a gift *causa mortis*; yet the gift necessarily failed for want of a correspondent delivery to or for the donee.¹

It is not enough to mark packages with the name of an intended donee, and give directions for their delivery to him after the donor's death. Thus, where one had written upon parcels containing the property the names of the parties for whom they were intended, and had requested C. to see that they were properly delivered to them after his death, it was held that the facts showed no gift *causa mortis*.²

A gift *causa mortis* of corporeal chattels cannot, then, be founded upon words of permission to take, or even of bestowal on condition of death, if unaccompanied by acts which go to divest the owner of control and dominion. Even a manifest intention requires actual delivery to give effect to the donor's purpose.³

As to incorporeal personal property, there is still confusion among the authorities, owing to the long-continued conflict between common-law and equity rules of transfer, to which we have already adverted. The steady progress which the courts have made in favor of sustaining transfers evidenced by writing, halting for a while at transfers made with the full solemnities peculiar to that class; then advancing once more

¹ Coleman v. Parker, Supr. Jud. Court, unpublished.

² Bunn v. Markham, 7 Taunt. 224; Hawkins v. Blewitt, 2 Esp. 663.

³ See Cutting v. Gilman, 41 N. H. 147.

towards the delivery of securities as the sole and sufficient test, and still onward, — all this has been observed in a former chapter.¹ The same progress is traceable in gifts *causa mortis*; consequently, the same jarring of the earlier and later authorities, and the same uncertainty of our present foothold.

Any bond not the donor's own obligation may now be the subject of a gift *causa mortis* by delivery of the instrument, with or without assignment in writing. Such is the current of the English and American decisions at this day.²

Debts secured by bond and mortgage, — as is the practice in England and some parts of this country, — or by the promissory note and mortgage more familiar in other States, are best delivered upon a regular assignment, with transfer of the securities; and it was long thought that they could not be given in any other way. But *Duffield v. Elwes* settled the law otherwise for England, and firmly established there that a bond and mortgage would pass as a gift *causa mortis* on mere delivery and a verbal declaration of gift, without any further assignment in writing; this, on the ground that while the donor's interest has not completely passed, such delivery of the instruments operates, by way of declaring a trust, far enough to enable the donee to come into equity and perfect his title.³ An unindorsed promissory note, it will be presently seen, passes by mere delivery likewise; and hence the same rule will naturally prevail where the mortgage is secured by note.⁴ Indeed, the principle has been extended so far, in a Connecticut case, that the donor's executor was not permitted to foreclose a mortgage of real estate, given to secure a promis-

¹ *Supra*, p. 72, under gifts *inter vivos*.

² 1 Wms. Ex'rs, pt. 2, bk. 2, c. 2, § 4; *Gardner v. Parker*, 3 Madd. 184; *Waring v. Waring*, 11 Md. 424; *Lee v. Boak*, 11 Gratt. 182; *Wells v. Tucker*, 3 Binn. 366.

³ *Duffield v. Elwes*, before Lord Chancellor Eldon, 1 Bligh, n. s. 497; 1 Sim. & St. 239. And see *Hurst v. Beach*, 5 Madd. 351.

⁴ *Veal v. Veal*, 27 Beav. 303.

sory note, although the note alone had been delivered to the donee by the dying owner, while the mortgage deed, never mentioned in the transfer, remained in the giver's hands until he died.¹ But as to a donee's rights under such circumstances as these last, there might be some question; and in most parts of this country exist local statutes concerning deeds and their registry, which operate as a restriction upon such transfers, notwithstanding the English rule.²

The celebrated case of *Duffield v. Elwes*, decided by Lord Eldon in 1827, on appeal, which reversed the decision of one so eminent as Sir John Leach in favor of the older, more conservative doctrine, appears to have been the turning-point in the English law of delivery. Upon the principle therein set forth, gifts *causa mortis* of bills of exchange, promissory notes, certificates of deposit, coupon-bonds, and negotiable instruments generally, are now upheld almost universally in England and America, even without an indorsement, provided only the instrument itself be delivered to the donee or some one in his behalf, with the suitable intention of transfer.³ So far as *Miller v. Miller*, and other earlier cases, hold to the contrary doctrine, they must now be regarded as overruled;⁴ and Lord Hardwicke's distinction between the delivery of property and the delivery of its evidence has assuredly lost its point.⁵ Of the modern doctrine, Chief Justice Shaw has said: "These cases all go on the assumption, that a bond,

¹ *Brown v. Brown*, 18 Conn. 410.

² In *Chase v. Redding*, 13 Gray, 418, a gift *causa mortis* of notes and real-estate mortgages was sustained on proof of delivery of the notes with proper assignments of the mortgages to the donee.

³ 1 Wms. Ex'rs, 7th Eng. ed. 776; *Ashton v. Dawson*, 2 Coll. 363; *Ashbrook v. Ryon*, 2 Bush, 228; *Bates v. Kempton*, 7 Gray, 382; *Westerlo v. De Witt*, 36 N. Y. 340.

⁴ *Miller v. Miller*, 3 P. Wms. 440; *Tate v. Hilbert*, 2 Ves. Jr. 111; *Bradley v. Hunt*, 5 Gill & J. 54.

⁵ See Lord Hardwicke, in *Ward v. Turner*, 2 Ves. Sen. 443; 2 Kent Com. 447.

note, or other security is a valid subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money, by a gift and delivery of the instrument that shows its existence and affords the means of reducing it to possession.”¹

But that such gifts must be confined to obligations of a third party, save where the donor means to forgive the donee his debt, and cannot embrace the donee's own simple promise to pay, or unaccepted bill, check, draft, or order, we have already shown.² A check remaining in the custody of the drawer is, of course, inoperative as a gift *causa mortis*.³ And any instrument in the nature of a draft or order upon some depositary or third party, by whatever name we may call it, requires, at least, that party's acceptance, before the donor's delivery can become operative.⁴

Among the later negotiable instruments which are held to pass by delivery as a gift *causa mortis*, are those known as deposit notes and certificates of deposit.⁵ These should always be carefully distinguished from unaccepted checks ; for here the donor gives to the donee a document, by which the depositary acknowledges that he holds so much money belonging to the donor at his disposal.⁶

It is held in England, that where one delivers a policy of life insurance, saying, “ This is yours,” that alone will operate as a gift *causa mortis* of the money due on the policy.⁷ The rule is doubtless to be confined to policies expressed for the donor and his legal representatives : it cannot extend to

¹ Shaw, C. J., in *Parish v. Stone*, 14 Pick. 198.

² *Supra*, p. 138.

³ *McKenzie v. Downing*, 25 Geo. 669.

⁴ See *Harris v. Clark*, 3 Comst. 93 ; *Bank v. Williams*, 13 Mich. 282 ; *Hewitt v. Kaye*, L. R. 6 Eq. 198 ; *supra*, p. 138 *et seq.*

⁵ *Moore v. Moore*, L. R. 18 Eq. 474 ; *Amis v. Witt*, 33 Beav. 619 ; *Westerlo v. De Witt*, 36 N. Y. 340.

⁶ *Romilly, M. R.*, in *Hewitt v. Kaye*, L. R. 6 Eq. 198.

⁷ *Witt v. Amis*, 1 Ell. B. & S. 109 ; *Amis v. Witt*, 33 Beav. 619.

policies taken out for the benefit of other parties ; nor, perhaps, would such gifts be allowed to take effect at all upon mere delivery of the document against plain language introduced into the contract of insurance, declaring all assignments void unless made in writing and assented to by the insurance company.¹

In view of the requirements of a transfer on the 'books of the company, the courts in England and some parts of this country are disinclined to sustain gifts of stock upon a mere delivery of the certificate to the donee, without pursuing the other legal formalities of a transfer.² Nor, according to the latest New Jersey decisions, can there be a valid gift *causa mortis* of stock privileges, the price not being payable nor the stock issuable till after the donor's death.³ But in New York a looser rule prevails ; for it is quite settled by a recent case, as the law of that State, that where the owner of stock assigns absolutely in writing certain of the shares represented by the certificate, an equitable title to the stock passes by the assignment, under circumstances otherwise favorable for treating the transaction as a gift *causa mortis*, so that the donor's legal representative becomes a trustee for the donee by operation of law to make the gift effectual. The court here ordered that the executor of the donor should produce the certificate, and cause a transfer of the donated shares to be made accordingly.⁴

Yet even in this last case, the certificate of stock was not handed over as the sole act of delivery. On the other hand, there was a formal assignment made, carefully executed, and witnessed ; and this was delivered, though not, as it appears, the certificate. By the rules of the corporation, such assign-

¹ There seem to be no American decisions in point. But see Trough's Estate, 75 Penn. St. 115.

² Moore v. Moore, L. R. 18 Eq. 474 ; Pennington v. Gittings, 2 Gill & J. 208.

³ Egerton v. Egerton, 17 N. J. Eq. 419.

⁴ Grymes v. Hone, 49 N. Y. 17.

ments of stock were to be in writing, and transferable on the company's books, upon surrender of the certificate.¹ That a gift *causa mortis* of stock in a bank, railroad, or other chartered company, can take effect upon the mere manual delivery of the certificate, without transfer on the books and without an assignment, does not as yet appear to have been clearly affirmed in any English or American court of last appeal; but the Supreme Court of New York has so ruled it with disrelish, and on the evident assumption that the authorities had left no halting-place.² On the other hand, it is the English chancery doctrine, that, where one gives shares, the gift is not perfected until the transfer is made; and the death of the donor meantime prevents his donation from taking effect, notwithstanding any directions he may have sent to the officers of the corporation for a transfer to the donee, which fail to reach them in season.³

The gift *causa mortis* of savings-bank deposits presents much difficulty; for though such a gift may undoubtedly be made by a draft in full, accompanied by the deposit-book, and seasonably presented at the bank counter, it is by no means settled that any thing short of this would constitute a delivery so complete as to debar all participation of the donor's representatives in the fund. That a very fine line separates gifts of deposits, must have been perceived already; for, as we have shown, the check drawn by a dying donor is invalid until the banker accepts or becomes a privy to the transfer; while the banker's certificate of deposit, or deposit note, on the other hand, which admits an existing indebtedness to the donor

¹ *Grymes v. Hone*, 49 N. Y. 17.

² *Walsh v. Sexton*, 55 Barb. 251 (1869). Says Peckham, J.: "In my judgment, this doctrine is fraught with the greatest dangers. It leads into temptation, from which we all pray to be delivered, and it greatly facilitates frauds. The whole thing is wrong. But it is settled by authority, and we are not at liberty to reverse it."

³ *Lambert v. Overton*, 13 W. R. 227. And see *Pennington v. Gittings*, 2 Gill & J. 208.

or his order, can be sufficiently donated by delivery of the writing. Now, as to any savings-bank, something should depend upon the mode of doing business under its charter and by-laws; for, though the usual course is, to furnish each depositor with a book wherein credits and debits are regularly entered, and the true balance, less accruing interest, appears on inspection, and then to require the presentation of this book for each payment, either by the depositor in person or by some one who brings the book and a draft payable to himself, yet there are many savings-banks in this country whose business is done essentially like ordinary banks of deposit, except as to allowing interest, whose pass-books exhibit deposits only, except as periodically balanced, and whose custom it is to honor checks without requiring any special presentation of the book. As to savings-banks of the latter description, there seems to be no reason for regarding the mere check of the donor as a good gift *causa mortis*, before presentation at the bank,—nor even the delivery of that accessory voucher, the pass-book, with or without such check.¹ Concerning the former kind, however, it might be argued that the deposit-book is something analogous to a certificate of deposit, and hence that the simple delivery of the book ought to give the donee an equitable title to the deposit therein represented; and seemingly, on some such ground, certain courts uphold so off-hand a transfer. This is a conclusion which ought not to be hastily adopted, leading as it does so readily to frauds upon an institution and its depositors. For a certificate of deposit is primarily designed to facilitate the business of the holder, who expects to indorse it over to pay his own debts instead of retaining it; whereas savings-bank deposits are put at interest, the book representing a sort of convenient permanent investment by instalments, and the main design of the institution, at least with banks of

¹ See *Beak v. Beak*, L. R. 13 Eq. 489.

the former description, being rather to put away carefully the customer's surplus moneys for his benefit, than to aid him in carrying on a brisk traffic on the credit of his balances.

That the delivery of the depositor's book in a savings-bank is not a sufficient delivery to constitute a gift *causa mortis* of the money deposited, is distinctly held in a well-considered Irish equity case, where the English authorities bearing upon this point are brought together, the question being treated as a novel one, and the evidence showing that the savings-bank in question did business as one of the former class above noticed.¹ This is likewise the declared rule in Kentucky.² And that there cannot be a valid gift *causa mortis* of a savings-bank book by word of mouth, when the book is not in the donor's possession, nor so situated as to be actually delivered before his death, is indisputable law.³ On the other hand, it is held in Rhode Island, that the gift *causa mortis* of a savings-bank deposit is sufficiently completed on delivery of the pass-book; the court, however, treating the case as one without precedent.⁴ It would appear that this is also the Connecticut doctrine.⁵

There are certain miscellaneous vouchers for money, such as due-bills, receipts acknowledging a loan or deposit, sometimes of a promissory character, the delivery of any one of which, under suitable circumstances, is held to constitute a valid and sufficient gift *causa mortis*, in conformity with the modern doctrine relating to incorporeal chattels personal.⁶

Of the delivery of a receptacle, as carrying what it contains, we have spoken, with reference to corporeal chattels. The rule ought even to be more stringent as concerns incorporeal

¹ *M'Gonnell v. Murray*, 3 Irish Eq. 460 (1869). And see *Beak v. Beak*, *supra*.

² *Ashbrook v. Ryon*, 2 Bush, 228.

³ *Case v. Dennison*, 9 R. I. 88; *French v. Raymond*, 39 Vt. 623.

⁴ *Tillinghast v. Wheaton*, 8 R. I. 536.

⁵ See *supra*, p. 76; *Camp's Appeal*, 36 Conn. 88, an analogous case of gift *inter vivos*.

⁶ *Moore v. Darton*, 4 De G. & Sm. 517; *Champney v. Blanchard*, 39 N. Y. 111.

than corporeal property; and yet in some States it appears that the delivery of a box and key, with intent to donate the contents, carries not only such promissory notes or coupon-bonds payable to bearer as the box may hold, but even a certificate of stock which happens to be there, without any other special delivery.¹ This is a dangerous doctrine to push far. But, on the other hand, pursuing our analogies, we find that the gift of a chose in action, or incorporeal chattel, cannot take effect if the instrument be put into an envelope, with directions for delivery indorsed upon it, and then retained by the donor under his control and dominion until his death.² So if one assigns a life-insurance policy under seal, in consideration of love and affection, and yet keeps the assignment and policy under his control, pays the premiums, and leaves the delivery to those who come upon his papers after his death, there can be no valid gift.³ Such an assignment could not be enforced, being without valuable consideration; nor will the seal import a consideration without delivery.⁴ In short, the yielding up of dominion, the parting of control, are requisite in incorporeal as well as corporeal property; and the attempt to create a trust in the nature of a gift by written directions for an executor or administrator to carry into effect, must fail, unless compliant with the statutes of wills.

There can be no doubt that a delivery of the property to a third person for the donee constitutes as good a gift *causa mortis* as though delivery had been made directly to the donee, the ordinary rules of delivery and incidents of the gift still applying. And upon this principle have such gifts, when made through the medium of friends, relatives, and even strangers, been sustained, from the earliest known period of

¹ Walsh v. Sexton, 55 Barb. 251.

² Phipps v. Hope, 16 Ohio St. 586; Trough's Estate, 57 Penn. St. 115; Zimmerman v. Streep, 57 Penn. St. 147; Mitchell v. Smith, 10 Law Times, N. S. 801; Farquharson v. Cave, 2 Coll. 356.

³ Trough's Estate, 57 Penn. St. 115.

⁴ Ib.

our law on this subject.¹ “Delivers, or causes to be delivered, to another,” is Blackstone’s expression.² In *Drury v. Smith*, — one of the first among the English reported cases, — the gift sustained was of property handed to a third person, to be delivered to the donee if the giver died of his disorder.³ And a late American decision supports a gift which was made by a miner, dying on board a steamer, who handed a bag of gold dust and coin to a sailor attending him, and told him to deliver the property to the purser, who then came, after receiving it, and took the giver’s last message as to its disposal.⁴ Obviously the wishes of a donor in peril of death would be constantly thwarted if the rule were otherwise.

And here is sometimes noted a difference between gifts *inter vivos* and those *causa mortis*; namely, that, as to the former class, the authority of one who takes from the giver to deliver to the donee is revoked by the giver’s death; whereas, in the latter kind of gift, the thing may be delivered to the donee, and accepted by him after the giver’s death.⁵

This distinction possibly proceeds, however, from a narrow view of the subject. For the death-bed delivery to a third person for the donee, which takes effect, is essentially a delivery, not to any agent of the donor, but to a trustee for the donee. It is of the essence of such gifts that the giver part with all control and dominion over the property for the time being; for though, doubtless, a gift *causa mortis* once made is revocable, it cannot be considered as ever made at all, so long as the delivery is to one who takes only as the donor’s agent, and whose custody continues that of the dying man. This is

¹ *Drury v. Smith*, 1 P. Wms. 404; *Boutts v. Ellis*, 17 Beav. 121; *Borneman v. Sidlinger*, 15 Me. 429; *Michener v. Dale*, 23 Penn. St. 59; *Sessions v. Moseley*, 4 Cush. 87; *Grymes v. Hone*, 49 N. Y. 17; *Southerland v. Southerland*, 5 Bush, 591; *Kemper v. Kemper*, 1 Duvall, 401.

² 2 Bl. Com. 514.

³ *Drury v. Smith*, 1 P. Wms. 404.

⁴ *Michener v. Dale*, 23 Penn. St. 59.

⁵ *Sessions v. Moseley*, 4 Cush. 87, *per curiam*.

illustrated by the English case of *Farquharson v. Cave*, where the Vice-Chancellor said: "I had some doubts, at first, whether the transaction might not be considered to amount to a *donatio mortis causa*; but, to arrive at that conclusion, I must be satisfied that there was a complete delivery in such circumstances as the law requires for that purpose. A mere delivery to an agent, in the character of agent for the giver, would amount to nothing." It must be, therefore, a delivery to the donee, or some one for the donee.¹ Even gifts *inter vivos*, as we have seen, may be executed by delivery to a third person as trustee for the donee.² The real point of distinction seems to be, that the gifts we are now considering, when made by delivery to a third person, usually contemplate a further delivery by the latter to the donee upon the donor's death, in pursuance of the peculiar trust; whereas, in a gift *inter vivos* once made to the donee's trustee, the transfer becomes complete without reference to any further act of delivery on the trustee's part, unless the gift were made with some such qualification, instead of absolutely; in other words, the one is always a conditional delivery, while the other is not usually so.

That the ordinary rules of agency apply to gifts *causa mortis* to much the same purport as in gifts *inter vivos*, may be inferred from the rule of checks, already considered.³ And it may be assumed, that, where the dying owner gives directions to a person to get property which is in some agent's hands for the purpose of fulfilling a gift *causa mortis*, and the directions do not reach that agent so as to enable him to attorn, so to speak, before the donor's death, the gift fails; just as a check, draft, or order upon a depositary drawn *causa mortis* is unavailing before it could be accepted. And hence there is no gift with delivery where a dying person simply

¹ *Farquharson v. Cave*, 2 Coll. 356. And see *Dresser v. Dresser*, 46 Me. 48; *Southerland v. Southerland*, 5 Bush, 591.

² *Supra*, p. 80.

³ *Supra*, p. 159.

requests A. to get certain property in possession of B., and, in case of death, settle bills, and divide the residue among C., D., and E.¹ In short, the custody of an agent for the donor should become a custody during the donor's life, as agent for the donee, or trustee for his benefit, in order that the gift may take effect. And as the donor may have an agent to make delivery for him, so, too, may the donee *causa mortis* have his agent duly empowered to fully accept on his behalf.²

Where a testator expressly directs the residuary legatee to deliver an article to an individual, and the legatee promises to do so, chancery will hold the legatee a trustee, and enforce delivery accordingly ; the principle being, that one interested in the estate cannot be allowed to receive more than he would have had, except for the reliance placed in the testator upon his assurance, and a consequent omission to make or alter his own will, as he might have done to accomplish the desired purpose. But it would appear that this rule cannot be extended to promises made by parties having no interest under the will to be affected by any such gift.³

Under somewhat peculiar circumstances of a third party's intervention, a gift *causa mortis* was sustained in *Boutts v. Ellis*. Here a man, on his death-bed, gave his wife a crossed check, and afterwards, remembering that it was crossed, asked a friend, as a matter of convenience, to take it and give the wife another in its stead. This was done ; but the friend's check was post-dated. The testator's check was paid before he died to his friend, who subsequently gave a check to the widow in place of his own post-dated check. It was held, in the English chancery courts below, and on appeal, that the gift was good.⁴

¹ Case *v. Dennison*, 9 R. I. 88.

² See *Moore v. Darton*, 4 De G. & Sm. 517.

³ *Sims v. Walker*, 8 Humph. 503 ; *Williams v. Fitch*, 18 N. Y. 546.

⁴ *Boutts v. Ellis*, 17 Beav. 121 ; s. c. 4 De G., M. & G. 249.

Now, as to delivery by a deed of gift, or other instrument in writing. The Roman law was quite explicit on this point in the time of Justinian, for it required every *donatio causa mortis* to be executed in the presence of five witnesses ; thus getting rid of dangerous abuses which had long been felt to exist, and placing such donations on a like sound footing with general testamentary dispositions.¹

These wholesome restraints upon a mode of transfer peculiarly liable to fraud have never been incorporated with the English law. Our gifts *causa mortis*, on the contrary, may be established upon the oral testimony of a single unimpeached witness as to slight words and acts amounting to delivery ; and this same delivery has been our boasted safeguard. But the question arises, Would our courts recognize a gift of this description, by deed of gift or other writing, without delivery ? We think they would not, as a rule, unless the writing were executed with such formalities that it could be set up as a testamentary instrument, and regularly admitted to probate. And such appears to be the settled conclusion in England, though the precise point appears never to have been directly passed upon.² Deeds of gift, we have shown elsewhere, were always uncommon in most parts of the United States ; while in States where they were formerly sanctioned, the practice has lost much of its old significance.³ A deed of gift, it is true, will sometimes accompany delivery of possession, in a death-bed disposition ; and so, too, have assignments, letters, and memoranda been found useful in a number of cases : all this, however, not, we presume, for affecting a transfer indepen-

¹ Colquhoun Rom. Law, § 1070 ; 2 Kent Com. 444.

² 1 Wms. Ex'rs, 7th Eng. ed. 780 ; Thorold v. Thorold, 1 Phillim. 1. Lord Hardwicke and Lord Rosslyn appear to have thought otherwise, according to certain *dicta* in Ward v. Turner, 2 Ves. Sen. 440 ; Tate v. Hilbert, 2 Ves. Jr. 120.

³ *Supra*, p. 84.

dently of delivery, but as clearly evidencing the gift which took effect because of a legally sufficient delivery.¹ In general, to execute and deliver a deed of gift, without delivering the thing itself, — unless, indeed, it were the true means of yielding possession of or “delivering” an incorporeal right, — would seem hardly to come up to the standard of our law of gifts *causa mortis*; and a deed of gift found among the maker’s papers after his death, and never delivered during his life at all, most assuredly confers no title whatever to the property described, if not duly executed as a last will and testament according to the statute.²

The only case, English or American, which appears to view deeds of gift *causa mortis* differently, is that of *Meach v. Meach*, decided in Vermont in 1852; and even here it is by no means certain that the chattels continued in the donor’s possession till his death. In this exceptional case, a man in peril of death executed one deed of all his real estate, and another of all his personal property, in favor of his wife, — both of which instruments were duly recorded a month before he died. Upon a bill for specific performance brought after his death against the heirs and next of kin, together with the personal representative, it was held that the deed of real estate could not be upheld, whether as a post-nuptial settlement, a gift *causa mortis*, or a testamentary disposition; but the deed of personal property, which comprehended stock on his farm and choses in action, and, as it would appear, purported to carry all the estate of which the donor should be possessed at his death, was sustained as a good gift *causa mortis*.³

¹ *Kemper v. Kemper*, 1 Duvall, 401; *Blake v. Lowe*, 3 Desaus. 263; *Grymes v. Hone*, 49 N. Y. 17.

² 1 Wms. Ex’rs, *supra*; *Smith v. Downey*, 3 Ired. Eq. 268; *Taylor v. Taylor*, 2 Humph. 597; *Martin v. Ramsey*, 5 Humph. 349; *Gibson, C. J.*, in *Nicholas v. Adams*, 2 Whart. 17, 24.

³ *Meach v. Meach*, 24 Vt. 591. The opinion of Redfield, C. J., in this case is remarkable for the boldness with which it applies equity

A deed of gift or formal assignment expressed absolutely, and as if to go into immediate effect, may be presumed to be intended as a gift *inter vivos* rather than *causa mortis*, and, in the absence of special circumstances attending delivery, should be construed accordingly. There is an English case in point, where Lord Cottenham held that an assignment made by A., upon a bond purporting to "hereby assign and transfer the within bond or obligation," and all her "right, title, and interest thereto," to B., followed by the usual power-of-attorney clause, evinced no gift *causa mortis*, though executed and delivered five days before her death, but an immediate and irrevocable gift.¹

While our decisions proceed, then, upon the apprehension that all gifts *causa mortis* require delivery, they yet leave room for inquiry as to whether there may not be circumstances which would dispense with the formal act of delivery; the donee taking control as such by virtue of some permission, and so making the transfer complete. That gifts *inter*

remedies in aid of a donor's purpose, and for its vigorous opposition to attempts, elsewhere noticed, to put limits to the amount capable of transfer by a gift *causa mortis*. But in seeking to defend, rather than deplore, the policy of such gifts, the learned Chief Justice was not in accord with the times. It is not unlikely that his views there set forth concerning deeds of gift *causa mortis* have since undergone a change; for, according to 3 Redf. Wills, 2d ed. 339 (1870), this eminent writer restates the decision so as to show distinctly that *the donee continued to have the control and management of the estate after the execution of the instrument*, — a very important fact; and besides, in a note, he admits that the view may ultimately prevail that the deed of the donor merely is no sufficient delivery to create a good gift *causa mortis*.

We have seen that a deed of gift *inter vivos* is upheld by way of estoppel against the donor. But *qu.* whether an estoppel should operate in the case of gifts like these, which the donor is permitted to revoke whenever he likes.

¹ *Edwards v. Jones*, 1 Myl. & Cr. 226. But cf. *Meach v. Meach*, 24 Vt. 591; *Grymes v. Hone*, 49 N. Y. 17, as indicating that such a presumption should not be deemed conclusive.

vivos admit of such transfer cannot be disputed ; and, on principle, the same privilege should extend to those of the present class.¹ Thus, if the dying donor wished to give *causa mortis* that which the intended donee had already in possession, on some bailment or trust, — as a borrowed book, or a boat under his supervision, — might he not say, “ I give you, to keep in case of my death,” the book, or the boat, as the case might be, without requiring the thing to be brought to his bedside, and going through a pantomime of delivery usually deemed superfluous ? And if, in pursuance of such a gift, the donee thereupon assumed and continued control, in the capacity of donee, would not the transaction be complete ? On this point we find nothing decisive. There is a Kentucky case which bears in favor of such a gift *causa mortis* ; the circumstances showing, as it would appear, that a gift was made by a husband’s relinquishing to his wife all claim on his part to a buggy and horse which she had in her possession.² To go a step farther : might not a gift *causa mortis* be made by directing such borrower, bailee, or agent of the donor, to hold the property as a gift in case of death to a certain-named donee ; and so carrying out, by the donor’s words and the custodian’s acts, an effectual gift to a third person for the donee, without an actual primary delivery by the donor ? Even to this extent would the principle appear to be carried in the same Kentucky case ; a gift to the wife being likewise sustained of certain promissory notes which were held by another, upon directions given the latter by the donor.³ But the real facts of the case do not clearly appear from the report ; while the decision, so far from being rested on the ground we have suggested, seems to have turned chiefly upon the meritorious character of the gift in that particular instance. There are, on the other hand, cases which, without being quite explicit, have a decidedly opposite leaning, as though it might be ruled

¹ *Supra*, p. 71.

² *Southerland v. Southerland*, 5 Bush, 591.

³ *Ib.*

that gifts *causa mortis* really deserved, in this respect, less favor than gifts *inter vivos*, and ought to depend for their validity upon a strict delivery of possession by the donor.¹

Notwithstanding the aid which chancery so readily affords for completing informal delivery, and carrying one's intention into effect, it is doubtless the rule, that, if any thing remains to be done by the donor which a court of equity would not have compelled him to do during his life, the gift *causa mortis* cannot be a good one.²

We now come to the acts requisite on the part of the donee to complete a gift *causa mortis*. Acceptance corresponds to delivery, and is doubtless, in most cases, if not altogether, the rounding act of the donation. And while, in all death-bed dispositions, the acceptance of what has been beneficially bestowed is often lost sight of, or rather will be taken for granted, no such presumption can here prevail against plain evidence to the contrary, any more than in gifts *inter vivos*. By acceptance is here meant acceptance in the character of donee; or, it may be, of a trustee with control for the intended donee; not simply the taking possession, — that acceptance which harmonizes with the donor's purpose of giving, as evinced by his own acts and conduct.³

But it should be further observed that gifts *causa mortis* differ from gifts *inter vivos* in admitting of an acceptance by the donee after the donor's death, in certain instances, any intermediate acceptance for another's benefit being preliminary rather than final. The gift *causa mortis* directly to a donee requires, at least, the acceptance conditional upon en-

¹ See *Walsh v. Studdart*, 4 Dru. & War. 159; *French v. Raymond*, 39 Vt. 623; *Miller v. Jeffress*, 4 Gratt. 472; *Case v. Dennison*, 9 R. I. 88, — none of which decisions need rest upon such a ground.

² See Lord Eldon, in *Duffield v. Elwes*, 1 Bligh, n. s. 497.

³ *Reddel v. Dobree*, 10 Sim. 244; *Delmotte v. Taylor*, 1 Redf. Surr. (N. Y.) 417; *Cutting v. Gilman*, 41 N. H. 147; *supra*, p. 85.

suing death, — which is always appropriate to such transfers, — to render it complete ; and acceptance in trust upon a like condition must follow the donor's delivery to any third person for the donee ; but when such third person receives possession, as often happens, to give to the donee only in case of the donor's death, the acceptance which gives final and full effect to the gift necessarily awaits the issue of the peril, and is postponed to the donor's death.¹

Such acceptance, however, as completes the gift *causa mortis* in its conditional character, and corresponds strictly with a donor's act of delivery, must be followed by continuous possession and control of the property till the donor's death ; and this for reasons which will more fully appear when we come to consider the revocability of such gifts.²

A few words as to the proof of execution needful to sustain a gift *causa mortis*. The same general principles, *mutatis mutandis*, which establish delivery in gifts *inter vivos*, will hold good here ; with this consideration always kept in view, that fraud casts its most alluring looks towards a dying person's bedside, and tempts the by-stander to lay hold of what he may, before a probate court can take jurisdiction, and appropriate, on the plea that he who shall never return to claim his own had turned it over to him as a farewell gift. Possession being once in his favor, time and stealth, he thinks, will do the rest.

Nothing, then, can be plainer than that possession of the thing alone does not establish delivery as a gift *causa mortis* ; and this more especially where the claimant had opportunity of obtaining wrongful possession before or after the owner's decease.³ On the contrary, the title being impeached by the

¹ See *Sessions v. Moseley*, 4 Cush. 87, *per curiam*.

² *Reddel v. Dobree*, 10 Sim. 244 ; *Hatch v. Atkinson*, 56 Me. 324 ; *Borneman v. Sidlinger*, 15 Me. 429.

³ *Lounsbury v. Depew*, 28 Barb. 44 ; *Cutting v. Gilman*, 41 N. H. 147 ; *Delmotte v. Taylor*, 1 Redf. Surr. (N. Y.) 417 ; *Kenney v. Public Administrator*, 2 Bradf. Surr. (N. Y.) 319.

proper party in interest, the possessor should show satisfactorily, first, that the property was suitably delivered to or for his use ; next, that this delivery was by way of gift ; lastly, so far as this be needful to the title, whether the gift was a gift *causa mortis*, or a gift *inter vivos*. Upon him who claims as donee is the burden of proof.¹ The surrounding circumstances are material to the issue, wherever the donor's intention is obscure. And, among those worthy of especial mention in the present connection are these : that the donor was or was not under some moral obligation to the donee for services rendered ; that, supposing he was, the gift was or was not altogether disproportioned to those services.² For the mutual relations of the parties go far towards explaining their transactions.

The words accompanying the act of delivery are an important element in determining the *quo animo* of the donor. And since the circumstances of a last illness will raise the presumption that the gift contemplated was *causa mortis* rather than *inter vivos*, a dying donor need not expressly declare that the gift is conditional upon his death from the existing disorder ; for the condition will be presumed, though only words of gift were used, unless the evidence negatives such an implication.³

The alleged donor's declaration of intention previous to the gift is admissible where the language used at the time of delivery was ambiguous. And his subsequent declarations, after delivering possession, that he had so given the property, are also sometimes admissible as against individuals who claim to hold by a privity of interest with the donor.⁴ But such delivery cannot be established by his subsequent

¹ See *Hebb v. Hebb*, 5 Gill, 506; *Cosnahan v. Grice*, 15 Moore P. C. 215; *Walter v. Hodge*, 2 Swanst. 92; *Hayslep v. Gymer*, 1 Ad. & Ell. 162.

² *Smith v. Maine*, 25 Barb. 33; *Westerlo v. De Witt*, 35 Barb. 215.

³ 1 Wms. Ex'rs, 7th Eng. ed. 772; *Gardner v. Parker*, 3 Madd. 184.

⁴ *Smith v. Maine*, 25 Barb. 33.

declarations, shortly before dying, to a person not connected with the gift.¹

It is the modern practice of the chancery courts of England, where any doubt exists, whether in point of fact there was that which would constitute a good gift *causa mortis* of property legally subject to such gift, to direct an issue to try that fact.² A bill of equity affords often the suitable course for testing title in the courts of this country, especially where the property in question is incorporeal.³ But the issue is quite commonly raised in a suit at law brought against the donee in possession, or the donor's representatives in possession, as the case may be, to recover the property improperly withheld from the party entitled to it.⁴

It is well settled that a gift *causa mortis*, as well as a gift *inter vivos*, may consist in the forgiveness of a debt ; this, however, being a matter for evidence. Thus, a gift of the present class was held established, where, upon a loan, the borrower had given the lender the following paper : " Received of D. £500, to bear interest at £4 per cent per annum ; " and it was shown that this receipt was given to the borrower's servant by the dying creditor, saying that she wished the debt cancelled.⁵ And, again, where a creditor declared that the money was the debtor's, and destroyed the bond or other security, which constituted the evidence of the debt.⁶ But a loan cannot be construed into a gift *causa mortis* upon evidence of some imperfect arrangement between donor and donee which was never carried out.⁷

¹ Rockwood v. Wiggin, 16 Gray, 402.

² 1 Wms. Ex'rs, 7th Eng. ed. 783.

³ Rockwood v. Wiggin, 16 Gray, 402; Southerland v. Southerland, 5 Bush, 591; Pennington v. Gittings, 2 Gill & J. 208.

⁴ Grymes v. Hone, 49 N. Y. 17; Case v. Dennison, 9 R. I. 88; French v. Raymond, 39 Vt. 623.

⁵ Moore v. Darton, 4 De G. & Sm. 517.

⁶ Gardner v. Gardner, 20 Wend. 526. And see Hurst v. Beach, 5 Madd. 351; Meredith v. Watson, 23 E. L. & Eq. 250.

⁷ Henderson v. Henderson, 21 Mis. 379.

CHAPTER VI.

GIFTS CAUSA MORTIS ; EFFECT OF EXECUTION : QUALIFIED GIFTS.

(5.) HAVING shown how gifts *causa mortis* are executed, we proceed next to notice the effect of their execution as between donor and donee.

The leading characteristic of executed gifts *causa mortis* is revocability. An ordinary gift once completed by competent parties is absolute and irrevocable as concerns the donor, unless procured by fraud ; but so wavering is the title acquired by such a transfer *causa mortis*, until fully confirmed by the donor's death as contemplated, that the gift is held specially revocable in three distinct instances, — (1st) by the donor's recovery from the particular peril ; (2d) by the death of the donee before him ; or (3d) by his own act revoking the gift,¹ — all of which principles we have adopted from the civil law, which pronounces the donation *causa mortis* conditional and *ipso facto* void if the donor escapes the supposed danger, or the donee dies before him, or the donor repents of the gift.² Of these three methods of revocation in their order.

First. Revocation by the donor's recovery from the particular peril has been established in well-considered cases, English and American. Thus, in the English case of *Staniland v.*

¹ See Bouv. Dict. *Donatio Causa Mortis* ; 2 Bl. Com. 514 ; 2 Kent Com. 444.

² Colquhoun Rom. Law, § 1071.

Willott, where the donor recovered from a paralytic stroke, which at the time threatened death, so as to be able to take a foreign journey, and, besides, to manage his affairs.¹ And, again, in *Weston v. Hight*, decided in Maine, where one dangerously ill with consumption so far escaped the peril contemplated as to attend to his ordinary business for eight months, though he finally died of the same disease.² But the question may sometimes be a nice one ; for the mere rallying of one's faculties, followed soon by a relapse, and finally death, from the sickness originally contemplated, would hardly suffice for such a revocation. As Chief Justice Gibson, of Pennsylvania, has said, a transfer of this kind ought not to be disturbed "by the alternation of hope and despair, dependent on the doubtful spinning of the die, but only by the turn-up of life."³

Second. Revocation by the donee's death before the donor is a principle which seems to be taken for granted at the English law, both from the reason of the thing and because it was the plain doctrine of Justinian's age.⁴ The rule of lapsed legacies is quite analogous, though a gift *causa mortis* is probably to be deemed more strictly personal to the donee than any legacy.⁵ But the prior death of the third person charged with delivery to the donee after the donor's death would not, we suppose, invalidate the gift to the donee, if the latter himself survived the donor.⁶

Third. Revocation by the donor's own act, or where, as

¹ *Staniland v. Willott*, 3 Mac. & G. 664.

² *Weston v. Hight*, 17 Me. 287.

³ *Nicholas v. Adams*, 2 Whart. 17. But see *supra*, p. 145, as to expectation of death, where this case is criticised.

⁴ Colquhoun Rom. Law, §§ 1070, 1071.

⁵ See 1 Sch. Pers. Prop. 734, 735; *Merchant v. Merchant*, 2 Bradf. Surr. (N. Y.) 432.

⁶ *Ib.* But see *Borneman v. Sidlinger*, 15 Me. 429.

the civilians would say, he repents the gift, is established at our law by numerous decisions. As early as 1710 it was ruled by the Lord Chancellor that a gift *causa mortis* is revocable during the donor's life, just as much as a will.¹ And by directing a return of the donated property, and resuming its possession as owner, the donor necessarily revokes and annuls his gift.² Nor is his declared intention to repossess himself of the property as his own, and his demand for the same, to be thwarted at any time by the custodian's unwillingness to surrender.³ The property thus resumed by the original owner by revocation of his gift *causa mortis* may be given away afterwards to some one else, or otherwise disposed of at the owner's pleasure.⁴

It is sometimes asked whether a gift *causa mortis* would be revoked *per se* by the donor's subsequent will. It appears that it would not, and for this technical reason, that a will does not operate until after the testator's death, at which precise point of time the gift would, from its very nature, become irrevocable.⁵

To the above enumerated special causes of revocation may perhaps be added in certain instances another, — the subsequent posthumous birth of a child to the donor. Under the French code, ordinary donations are absolutely revoked by the birth of children. And it is held in New York, that where the local statute causes the revocation of one's will by the

¹ Jones v. Selby, Prec. Ch. 300.

² Bunn v. Markham, 7 Taunt. 230; Merchant v. Merchant, 2 Bradf. Surr. (N. Y.) 432; Wigle v. Wigle, 6 Watts, 522; Parker v. Marston, 27 Me. 196.

³ Merchant v. Merchant, *supra*.

⁴ Parker v. Marston, 27 Me. 196.

⁵ Jones v. Selby, Prec. Ch. 300; Hambrooke v. Simmons, 4 Russ. 25; Nicholas v. Adams, 2 Whart. 17; Merchant v. Merchant, 2 Bradf. Surr. (N. Y.) 432.

subsequent birth of a child, the same consequence would follow a gift *causa mortis*.¹

Concerning revocation, it need hardly be added that on the ground of mental incapacity, or fraud, force, or palpable error, gifts *causa mortis* might be annulled like ordinary gifts; nor that it is in the power of the parties concerned in the donation, by their own mutual assent, properly manifested, to put an end to the transfer.² But there appears to have been a peculiar class of cases recognized by the Roman law; namely, where a donor makes his donation *causa mortis*, and engages specially not to revoke it, the effect of which was to render the gift irrevocable.³ Our *post obit* deeds are somewhat of this description; but any ordinary stipulation not to revoke a parol gift *causa mortis* at our law would not strengthen the donee's title, since, after all, gifts are without consideration, and such a stipulation is *nudum pactum*.

The donee of a gift *causa mortis* derives his title directly from the donor, and not from the donor's executor or other personal representative. The assent of such representative, therefore, after the donor's death, is not in any way essential to the donee's title; nor has the executor or administrator any claim whatever upon the property for the ordinary purposes of administration and the claims of distributees.⁴ If the donor's executor or administrator receives the thing and converts it, the donee may sue him in *assumpsit*.⁵ And where the donee in possession gives up the property under a misapprehension of his rights, and acting with the advice of counsel, he is not debarred from recompense on making his

¹ *Bloomer v. Bloomer*, 2 Bradf. Surr. (N. Y.) 339; 2 Burge, 205.

² *Supra*, p. 64.

³ Colquhoun Rom. Law, § 1070.

⁴ *Gaunt v. Tucker*, 18 Ala. 27; *Michener v. Dale*, 23 Penn. St. 59.

⁵ *Michener v. Dale*, 23 Penn. St. 59.

title good under a suit brought to recover.¹ So, too, if the gift be of a promissory note or some other negotiable chose evidenced by a voucher, which the donee possesses, the latter may sue the party liable thereon, though such party has already settled with the donor's representative without requiring the voucher to be produced.²

The executor or administrator of an alleged donor has corresponding rights against all persons retaining property of the deceased under the fictitious claim of donees *causa mortis*; and it is his duty to dispossess them. Thus, where, in a case of stock privileges, which were incorrectly deemed a subject of gifts *causa mortis*, the executor had paid for the new scrip after the testator's death, and directed an issue of the same in the name of the supposed donee, the payment was afterwards disallowed in his probate accounts.³

(6.) We come now to the effect of the execution of a gift *causa mortis* as to third persons, including the donor's creditors. The leading principle to be here applied differs not from that already considered under gifts *inter vivos*; though, the issue being practically postponed until after the donor's death, the law takes a narrower range. A gift *causa mortis* cannot be allowed to defeat the just claims of creditors; and as to existing creditors, at least, it cannot avail an insolvent's estate that fraud was not actually intended. Such is the rule of civilized Europe and America, of both the civil and common law.⁴

Upon an utter deficiency of assets, then, to pay the lawful claims of creditors from the donor's estate, and the exhaustion of funds for legacies and distributive shares, any gift

¹ *Westerlo v. De Witt*, 36 N. Y. 340.

² *House v. Grant*, 4 Lans. (N. Y.) 296.

³ *Egerton v. Egerton*, 17 N. J. Eq. 419.

⁴ 2 Bl. Com. 514; Dig. 39, 6, 17; 2 Kent Com. 448, citing Voet. Com. ad Pand. 39, 5, § 20, and Pothier *Traité des Donations*, sec. 3, art. 1, § 2. And see *supra*, pp. 108, 112.

causa mortis must give way, so far as may be requisite to discharge lawful demands; in which case the executor or administrator may sue to recover the gift, or its value, on behalf of creditors, and the donee must respond accordingly.¹ And it is held that an executor or administrator, who has admitted claims made against his intestate's estate before they were barred by the special statute of limitations provided for such cases, and has agreed with the creditors to bring a suit for their benefit to recover a gift *causa mortis*, may sue after the expiration of such statute of limitations; and that, having brought a bill in equity for that purpose, he may likewise recover his costs and the incidental administration expenses, if the donee, instead of admitting a liability for such debts, had undertaken to oppose the suit.²

(7.) As to qualified gifts *causa mortis*. Besides the condition of expected death, there may be other qualifications annexed to these gifts, though instances of the kind rarely occur in practice. Thus it is held that a gift *causa mortis* may be good, even when coupled with the trust that the donee shall provide for the donor's funeral.³ Such a gift, too, might be conditioned to be in full of the donee's share in the donor's estate; in which case the donee cannot claim a distributive share without surrendering or accounting for the donation.⁴

But a qualified gift *causa mortis* is not sustainable as such, when the property is bestowed, not for the donee's benefit, but as a trust-fund for benevolent uses at his unlimited discretion; as in the instance where the dying intestate gives property to A., the proceeds of which are to be distributed

¹ *Drury v. Smith*, 1 P. Wms. 406; *Ward v. Turner*, 2 Ves. Sen. 434; *Michener v. Dale*, 23 Penn. St. 59; *Chase v. Redding*, 13 Gray, 418; *Borneman v. Sidlinger*, 15 Me. 429.

² *Chase v. Redding*, 13 Gray, 418.

³ *Hills v. Hills*, 8 M. & W. 401.

⁴ *Currie v. Steele*, 2 Sandf. (N. Y.) 542.

according to the discretion of B., for whatever objects of benevolence, in B.'s judgment, shall be thought most worthy.¹

(8.) As to the general policy of gifts *causa mortis* little need be added. The courts have in some instances spoken favorably of such transfers. Thus, Sir John Romilly, M. R., in recognizing that modern doctrine, not as yet hedged within sure limits, under which is sanctioned the gift of incorporeal debts by the manual delivery of unindorsed and unassigned securities perhaps of immense value, says: "It does seem to be a more healthful state of the law, that the question whether it is a good *donatio mortis causa* should not depend upon a mere technicality; namely, upon whether a deceased person has actually written his name upon the back of a promissory note when he intended the donee to have the full benefit of it."² But the later experience of the courts with this same subject must tend to convince the thoughtful that we are driving upon breakers which threaten to make utter wreck of our death-bed donations. They are too light craft for such waters. In fact, gifts *causa mortis* should constitute an exception, and not the rule. We should feel that statutes of distribution offer primarily the simplest and wisest disposition of a dead man's wealth; that the policy of the statutes should hardly be disturbed, when death confronts the owner, save by his carefully written, carefully executed, and carefully witnessed last will and testament; that nothing beyond this, except it be the bestowal of sundry trifling keepsakes and farewell tokens among friends and dependants, ought to disturb the sanctity of an occasion when worldly possessions are but dross to the owner. If more than this favor should be extended to gifts *causa mortis*,—we are now speaking of policy, and not of legal precedent,—then those same safe-

¹ *Dole v. Lincoln*, 31 Me. 422.

² *Veal v. Veal*, as reported 6 Jur. n. s. 528; s. c. 27 Beav. 303, 309.

guards, which the law has wisely thrown about testamentary dispositions, — safeguards not even sufficient in these days to prevent the reckless and greedy from seeking to set up against the living the gifts they have wrested from the enfeebled and dying, — are the least which representatives and those rightfully interested in the estate can demand in their own behalf. For the latter might by agreement, if so disposed, carry out the donor's last wishes to the utmost, however informally expressed ; and if their good-will cannot be depended upon, in furtherance of the design, what course can be more appropriate than to accompany the gift by a written instrument, signed and duly witnessed, such as Justinian decreed for the Romans ? Pens, ink, and paper are almost always at hand ; and in this age of popular education, the means of applying them should not often be thought difficult. But if time presses, then let an act which of itself calls for deliberation fail, rather than hastily set up strangers against those nearest allied by blood or marriage, and run the risk of alienating one's own kindred, whose claims are first, for the sake of earning after death the uncertain gratitude of some stranger. Secrecy in extensive gifts of this kind is never desirable ; the worthy recipient must take an unpleasant *onus* in a title likely to be assailed and of doubtful proof ; while the deceitful one takes too easy risks with the heirs whom he means to defraud.

Since the first gap was made in the law of delivery on behalf of incorporeal property gifts, the dangers attending these death-bed dispositions have constantly grown. The courts say they must extend the path, yet they regret its direction. Lord Eldon himself, even in the act of clearing away the most formidable barrier which common-law conservatism had left standing, said : “ Improvements in the law, or some things which have been considered improvements, have been lately proposed ; and if, among those things called improvements, this *donatio mortis causa* were struck out of our law

altogether, it would be quite as well.”¹ And, at the present day, when the effort to carry out a giver’s intention has resulted in encouragement to a giver to leave his deliberate intention in lasting doubt, where legal consistency seems to require reluctant courts to uphold a nurse in sole attendance upon some foolish person in carrying off stock, bonds, and promissory notes, with little more ado than floor-sweepings or waste paper, utterly regardless of the claims of kindred, it is no wonder that we find the reports full of judicial regrets that the gift *causa mortis* was ever admitted into our law at all.²

A leaf from the Roman history of donations may well serve us at last. The legislature may in time, and should, extend to gifts *causa mortis* the solemnities requisite for the execution of wills ; or if these transfers are to be still kept up without such execution, — as they might properly be for slight keepsakes and memorials, from one both just and generous with his goods, — then there should be provision that no gift *causa mortis*, resting upon mere delivery, and without such execution, should operate to deprive those legally entitled in case of intestacy, beyond a certain proportion of the donor’s entire estate.³ Until public policy works up to this point, the courts may well apply the maxim put forward in one of our late American decisions: “It is far better that occasionally a gift of this kind fail, than that the rules of law be so relaxed as to encourage fraud and perjury.”⁴

¹ Duffield v. Elwes, 1 Bligh, N. S. 533.

² See, e. g., Walsh v. Sexton, 55 Barb. 251; Tillinghast v. Wheaton, 8 R. I. 536.

³ See *supra*, pp. 132, 168.

⁴ Hatch v. Atkinson, 56 Me. 324.

PART VI.

TITLE TO PERSONAL PROPERTY BY SALE.

CHAPTER I.

LEADING ESSENTIALS OF A SALE.

TITLE by sale, now to be discussed in successive chapters, is by far the most important, besides being the most difficult, subject for treatment under the head of Personal Property. Transfers of this character, beginning in simple barter or exchange for mutual convenience and profit ; next, with the substitution, as civilization goes forward, of a local money standard ; lastly, spreading out, under the influence of the commercial spirit, into a universal interchange, upon principles still deeply rooted, but ramifying in all directions, and demanding the world's medium of exchange as the standard of price, — these constitute the mainspring of worldly business activity. Here is a method of acquisition existing by pure act of the parties ; founded in contract ; applicable to every species of property, and to property alone ; commended to all conditions of mankind by the requirement of a substantial equivalent, or *quid pro quo*, so that, unlike the case of gift, each party may hope to gain, and neither expect to lose, by the transaction.

But the law of sales, technically speaking, may fairly be thought, in these days, to embrace personal property alone ;

for though one in common phrase talks of real as well as personal estate sales, lawyers now incline to confine the term to personal property alone, classing the corresponding real-estate cases under the less obvious but fairly equivalent title of "vendors and purchasers." It is well that the price transfers of property under these two grand divisions should be kept apart; for the law, in truth, treats them very differently the one from the other. Sales, in the technical or more limited sense, must be, at all events, the subject of exclusive attention in these pages.

A sale is a transfer by mutual agreement of the absolute title to certain property, — that is to say here, to certain personal property, — for a certain price.¹ That it is a transfer of the absolute title should distinguish it from loan, hire, and the taking of property by way of bailment or trust generally; a matter, however, not always of easy discrimination, as we shall take occasion to show hereafter.² That the transfer is by mutual agreement, indicates clearly enough that sales are a species of contract, and require, like other contracts, to be executed by competent parties; not by those who, from immaturity or incapacity of mind, or other legal disability, are unable to make a binding agreement.³ And, once more, that there is a price, shows, as some of the later writers earnestly insist, that by sales the courts refer, at the present day, to transactions conducted on a money basis.⁴

¹ See Story Sales, § 1; Williamson v. Berry, 8 How. 496; Benj. Sales, bk. 1, pt. 1, c. 1; 2 Kent Com. 468; Bouv. Dict. "Sale." It is a matter of regret that Mr. Benjamin, in his excellent work on Sales, to which we shall frequently have occasion to allude, has not, in the editions thus far published, seen fit to make permanent subdivisions of his text by running sections or star pages, so as to allow of a more precise citation applicable to all editions alike.

² *Infra*, as to Loan and Hire.

³ *Supra*, pp. 62, 64; Benj. Sales, bk. 1, pt. 1, c. 1.

⁴ Benj. Sales, bk. 1, pt. 1, c. 1; Williamson v. Berry, 8 How. 496; Story Sales, § 216.

A word, however, as to barter, which may be taken as the germ of our modern sale. The contract of barter is that by which parties exchange goods for goods, or one thing for another. Barter prevails in a rude age. It was the old primitive trade of England, and likewise of her colonies; and it still continues between Indians and backwoodsmen. The large trade of furs in exchange for the necessities of life, on the Canadian and Mississippi frontiers, during the last century, serves as a memorable example of this sort of transfer. Each party to a barter doubtless has his mental standard of value; but it takes a positive law, fixing money rates, which is mutually recognized, and to which both parties may readily refer from familiarity with the standard, to bring sales proper into their rightful place. When this is accomplished, the old barter becomes thenceforward commonly resolved into two separate transfers, each with its declared or implied price; and every transfer for value may stand by itself, with no need at all of a corresponding one to balance; while, if there be such corresponding one, the legal inclination is to treat them as independent and not mutual transfers. Thus does barter or exchange sink out of judicial contemplation, such traffic rather anticipating the reports than keeping along with them. Blackstone, who had little space to bestow upon the law of sales, is rather indifferent to distinctions between sale and exchange, following the fashion of his time; and, declaring that there is no difference between them in law, he treats of them both under the general denomination of sales.¹ Kent enlarges more on the subject, as had then become needful; but in defining a sale as a transfer "for a valuable consideration," he, too, uses language broad enough to include barters.² Our prevailing disposition at this day seems to be, however, to regard barter or exchange as an analogous, rather

¹ 2 Bl. Com. 446, 447.

² 2 Kent Com. 468.

than identical, topic with sale.¹ And yet, after all, the rules of law applicable to a sale and exchange are substantially the same; the only point of difference worth noticing appears to lie in the form of pleading where suit is brought for a breach;² and it may well be assumed that any act of legislation which applies to sales would not by inference exclude a barter.³

So, too, should it be added, irrespective of barter, that sales are not universally made for a strict money payment; for, to say nothing of payment in commercial paper, a purchase is sometimes made of articles of a certain kind, at a price payable in articles of another certain kind, — a transaction which cannot be deemed an exchange of goods, or even a purchase of the latter kind of articles.⁴

Sales may be variously classified, according to the aspect from which the particular transfer is regarded. There are *absolute* sales, or those which are made and completed without qualification of any kind; and there are *qualified* or *conditional* sales, which depend for their validity upon the fulfilment of some condition. There are *executed* or complete sales, whereby the title to the thing sold becomes vested in the buyer, because the sale is concluded; and there are *executory* sales (or rather sales resting in executory agreement), in which the property has not yet passed from the seller, because something yet remains to complete the sale. There are sales of *specific things*, where the chattels are at once identified and appropriated to the contract; and there are sales of *things not specific*, or a sort of contract for the supply of chattels answering a particular description, but not

¹ See Benj. Sales, bk. 1, pt. 1, c. 1; *Sheldon v. Cox*, 3 B. & C. 420; *Hands v. Burton*, 9 East, 349; *Story Sales*, § 216; *Bouv. Dict.* "Sale."

² *Vail v. Strong*, 10 Vt. 457; *Mitchell v. Gile*, 12 N. H. 390.

³ *Howard v. Harris*, 8 Allen, 297, *per* Bigelow, C. J. And see *Straus v. Herman*, 45 Geo. 222; *Carey v. Guillo*, 105 Mass. 18; *Bixter v. Saylor*, 68 Penn. St. 146, as to rescinding a barter for fraud.

⁴ *Herrick v. Carter*, 56 Barb. 41; *Hale v. Hays*, 54 N. Y. 389.

yet identified and appropriated. There are *legal* sales ; and there are sales *illegal* or *fraudulent*. There are *private* sales, which is the usual case of sale transactions between man and man ; and there are *public* sales, where the property is put up at auction, to go to the highest bidder, — the ordinary law of sales being here subjected to some striking modifications. All of these classes will claim attention as our investigation proceeds, and the distinctions they suggest should never be lost sight of.

And, once more, though most sales are to be deemed voluntary, there exists (independently of all questions of fraud in a bargain) a class of *involuntary* sales. Such sales are made without the owner's consent, theoretically speaking ; in other words, not by himself, but by some officer of the law, such as a marshal or sheriff, who acts in obedience to the mandate of the court, and on behalf of creditors ; or, perhaps, as in the instance of a mortgagee with power of sale, by the creditor himself on his own behalf. To the class of involuntary sales should be referred all sales on execution or in bankruptcy, and, in short, whatever are termed forced sales. The term *judicial sale* is well applied to transfers of this description, so far as they have the characteristic of a court's direction ; and, indeed, the same term might likewise extend to some others not so clearly involuntary or forced ; such as sales by executors or administrators, guardians, and trustees. To examine at any length sales of this description — which, indeed, are not quite homogeneous — would seem hardly appropriate to this treatise. The usual principles of the law of sales largely apply, and more particularly those of public or auction sales ; beyond which there is little room for generalizing, without entering into details of local practice. The law of judicial sales, too, concerns real far more than personal property. But there is this peculiarity about such sales, that, unlike ordinary sales of chattels carrying an implied warranty of the seller's title, these involuntary or judi-

cial sales have the effect, by a sort of quitclaim, of transferring possession with whatever right and title the holder may have had, and, beyond this, insuring to the purchaser only a jurisdiction in the premises, or authority to make the sale.¹

To every sale there are two primary parties : one, the seller, or vendor ; the other, the buyer, vendee, or purchaser, — a sale being sometimes conducted for one or both principals, however, through agents, such as brokers, factors, or commission merchants. The transaction, though with reference more appropriately to the details of agreement than to the final result, is often known as a bargain ; the full expression, in the old books on real property, being “bargain and sale,” which modern usage extends to chattels.² The legal doctrines of sale are discussed more with reference to corporeal than incorporeal property, — to wares and merchandise particularly ; but there is no leading difference between our two classes, save so far as might arise from the peculiar nature of the property in question, which, if founded in a money right, or debt or claim of some sort, brings a third party, namely, the debtor, within view of the transfer, and so may call for additional rules.

Waiving any special inquiry as to parties competent to contract, we lay down at the outset these three leading essentials to every sale : (1st) a thing to be sold ; (2d) a price ; (3d) mutual assent to the transfer of the thing at the price. These three essentials may be separately treated, after the traditionary custom with writers on sales, who, however, in trying to keep the thing, the price, and the mutual assent quite apart, in abstract contemplation, have sometimes caused confusion to themselves and their readers, — the fact being

¹ See Bouv. Dict. “Judicial Sale.”

² See Bouv. Dict. “Bargain.”

that this contract idea permeates the whole substance, making the question not alone of a thing and a price and a mutual assent, but, further, of the particular thing and the particular price, and of mutual assent as applicable to both.¹

(1st.) There must be a thing to be sold. For though a sale is a transfer, founded in contract, the transfer must operate upon property, — and, here, upon personal property, — the suitable subject of transfer. What is not in existence, as property, when the title passes, cannot be sold, though it has previously existed, or may come into existence hereafter; and whatever might be said of executory contracts of sale to take full effect hereafter, a sale, as such, stops not short of full execution, of delivery and acceptance as a finality, of at least an ideal passage of title in something definite and identical. And while there might be the complete sale of something only constructively in the seller's possession, there can be no sale of that which it is logically impossible that any one owns.²

An instance of that which was the subject of property, but continues such no longer, is that of a horse which I undertake to sell to-day, but which, as it appears after the bargain is made, died yesterday. The sale is void, for the transfer of title contemplated cannot possibly occur. And so would it be with the sale of goods in some warehouse, which proves to have already been burnt up. Nor would it avail the seller that he had bargained in good faith, believing that the thing really existed. The civilians agree with us on these points.³ But the further legal question arises, whether, if the thing be partially and not totally destroyed and out of existence, the

¹ See Benj. Sales, bk. 1, pt. 1, c. 1; 2 Kent Com. 468; *Gardner v. Lane*, 12 Allen, 39; *Story Sales*, § 1.

² 2 Kent Com. 468; *Story Sales*, § 184; Benj. Sales, bk. 1, pt. 1, c. 4.

³ 2 Kent Com. 468; *Pothier Contrat de Vente*, No. 4; *Hinde v. Whitehouse*, 7 East, 558; *Thompson v. Gould*, 20 Pick. 139; *Franklin v. Long*, 7 Gill & J. 407.

sale of the whole can carry the residue. The better opinion is, that the question of sale or no sale should here be left to the buyer's option; for while he ought to be allowed what is left, on a reasonable abatement of the original price, if he desires to stand to the bargain, yet he ought not to be forced, since the partial destruction of the thing may materially have affected the original inducement to its purchase. But the question, as one of common law, is not settled by authority.¹

So, too, the sale of an annuity dependent on a certain life is null, when it turns out that the life had already expired.² And a contract having been made for selling a specific future crop from a specific piece of land, the seller is excused from completing the bargain if the crop afterward perish without his fault so as to render execution by delivery impossible.³

A cargo of corn loaded on a vessel not yet arrived in port was sold May 15th. It proved afterwards that the corn had become heated, and was discharged by the master at an intermediate port, and there properly sold on the 21st of April. The court held, therefore, that the later sale of May 15th could be repudiated by the purchaser. The decision was correct; for, so far as the parties to the later bargain were concerned, there had been no subject-matter of sale whatever.⁴ Even supposing one may quitclaim an uncertain interest or an imperfect title to a thing, he cannot make a valid bargain and sale of that which absolutely belongs to some one else as owner.

Again, the sale of that which has not come into existence as property at the date of transfer is null. But with the

¹ See 2 Kent Com. 468, 469, citing Papinian and Pothier, of the civilians.

² Strickland v. Turner, 7 Ex. 208.

³ Howell v. Coupland, L. R. 9 Q. B. 462; Taylor v. Caldwell, 3 B. & S. 826. And see Conditions, *infra*.

⁴ Couturier v. Hastie, 9 Ex. 102, 5 H. L. Cas. 673, reversing 8 Ex. 40. See Warranty, *infra*.

growth of equity jurisprudence, and the legal recognition of incorporeal rights as a subject of transfer, has come a decided change in the old rule; and that in which one has a potential interest may now be sold, though not a mere possibility coupled with no interest whatever, potential or actual. Such prospective interests as freight or wages to be earned on a certain voyage, the reversionary rights of heirs, and future earnings on some existing contract of service, are suitable subjects of sale and assignment.¹ So, too, is the sale good of all the year's wool on one's own sheep; all the milk his own cows will yield for such a period, or the next season's crop from his own farm; of these sales contemplating in effect the product of something which the seller already owns.² But, on the other hand, the sale of the crops on somebody else's farm, would not be good; nor the milk of another's cows, nor the wool from another's sheep; nor, in a word, the profits, income, or increase of that which is not yet the subject of one's ownership, either as income or capital, even though a future ownership therein be contemplated.³ A mere possibility, too, without any present interest, which grows out of no present property in the seller nor an existing contract to which he is a party, cannot be the subject of actual sale.⁴

It must be confessed, however, that the line of distinction is not always clearly kept between salable and unsalable interests in things with a potential existence. Thus it is in accordance with our rule to hold the sale by a pearl-fisherman good of any pearls that may be found in oysters he owns. But the civilians, followed by Mr. Story, have further said,

¹ 1 Sch. Pers. Prop. 97, 98.

² *Ib.*; *Bellows v. Wells*, 36 Vt. 599; *Jones v. Richardson*, 10 Met. 481; *Benj. Sales*, bk. 1, pt. 1, c. 4; *Story Sales*, § 186; *Robinson v. Macdonnell*, 5 M. & S. 228; *infra*, as to assignment.

³ *Ib.*; *Reed v. Blades*, 5 Taunt. 212.

⁴ *Ib.*; *Head v. Goodwin*, 37 Me. 181; *Hartley v. Tapley*, 2 Gray, 565.

upon the strength of the illustration, that an expectation dependent upon a chance may be sold,—a proposition which is not readily taken into the mind, nor, as it seems, true in any comprehensive sense.¹ On the contrary, the sale in advance of all the fish that may be caught by the master and crew of a vessel upon an intended voyage is held to be void, for want of a vested interest in the possibility.² And yet the sale of the “lay” or profits of whaling voyages have been upheld: this, on the ground, as it would appear, that such a share in profits accrued as wages to the seaman.³ It is well settled that the sale of future wages, unconnected with some actual contract of service, is invalid for want of a subject-matter.⁴ So, too, would be the transfer by a professional man of all the prospective fees to be made by him for a specified future period; the hope or expectation not being here founded upon a right *in esse*.⁵

The best that can be said of the sale of possibilities or contingencies, uncoupled with an interest in or growing out of property, is, that, where the transaction is not designed as a positive sale to take immediate effect, it may be regarded in the light of an executory bargain of the parties, to become executed as soon as the vendor actually acquires a title; or, in other words, when the property shall come into existence. On this ground the transaction may stand; namely, as a valid agreement to sell, but not as an actual sale.⁶ If the seller, not owning the property at the time the

¹ Story Sales, § 185; 2 Kent Com. 468, *n.*; Benj. Sales, bk. 1, pt. 1, c. 1; Dig. l. 8, § 1; Pothier Vente, No. 6.

² Low *v.* Pew, 108 Mass. 347 (1871).

³ Tripp *v.* Brownell, 12 Cush. 376; Gardner *v.* Hoeg, 18 Pick. 168.

⁴ See Hartley *v.* Tapley, 2 Gray, 565.

⁵ Skipper *v.* Stokes, 42 Ala. 255.

⁶ Benj. Sales, bk. 1, pt. 1, c. 4; 1 Sch. Pers. Prop. 98; Story Sales, § 186; Lunn *v.* Thornton, 1 C. B. 379; Head *v.* Goodwin, 37 Me. 182; Hamilton *v.* Rogers, 8 Md. 301; Bellows *v.* Wells, 36 Vt. 599; Moody *v.* Wright, 13 Met. 17; Calkins *v.* Lockwood, 16 Conn. 276.

agreement is made, yet clearly evinces the intention of giving the agreement effect, after he has acquired title and the property, so to speak, has come into existence, or if at that later period the buyer obtains possession under authority to take the property, the transfer at length becomes complete.¹ It is doubtful whether the law of executory bargain would go further than this; though equity regards the seller or transferee with more favor, apparently, and to the extent of making the beneficial interest in the thing sold vest immediately in the buyer as soon as the seller acquires title and the thing can be identified, unless the contract has meantime been repudiated.² But whether some new act or recognition on the seller's part is or is not requisite when the thing comes into existence, seems to depend on the mutual intention of the parties; all this being a matter of contract, and the transaction, where the rule is applied, amounting frequently not to a sale, but a mortgage, of after-acquired property.

(2d.) There must be a price. By price is to be understood a money valuation applied to the thing sold; and it is an old maxim, that no sale can take place without its price. But this means not necessarily a money sale. Even they who find fault with Kent and others for using the expression "valuable consideration" to designate this essential, thereby bringing barter and sale into the same general category, show their own inconsistency by asserting that a sale must be, not for money alone, but for money or its negotiable representative.³

¹ *Ib.*; *Brown v. Bateman*, L. R. 2 C. P. 272; *Pierce v. Emery*, 32 N. H. 484; *Pennock v. Coe*, 23 How. 117.

² *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Bolding v. Reed*, 34 L. J. Ex. 212; *Benj. Sales*, bk. 1, pt. 1, c. 4; *Frazier v. Hilliard*, 2 Strobb. 309; *Blackmore v. Shelby*, 8 Humph. 439.

³ *Supra*, p. 188. Cf. *Story Sales*, §§ 216-218, *Williamson v. Berry*, 8 How. 495, *Benj. Sales*, bk. 1, pt. 1, c. 1, with 2 Kent Com. 468, 2 Bl. Com. 446, 447.

If, then, as every day's experience shows us, bills and notes may be taken, not alone by way of postponing settlement until reduced to money, but as the very payment of price, why not other incorporeal chattels, such as stock or bonds? And if other incorporeal chattels, why not corporeal chattels? So may a sale be good, though on credit, and not for cash at all. Indeed, it would appear to us that a sale is good for money's worth, and not necessarily for money alone; that it is enough to say that there must be, by way of price, a money standard mentally applied to the thing sold, in consideration of the transfer; that the transaction must be conducted on a money basis, and brought to such calculation, whether payment be made in money or not, before the sale is complete.

It has been ruled that the seller may sue and recover the purchase-money, where the sale was of dry-goods, which the buyer agreed to pay for in nails at a certain price, to be delivered on or before a certain day specified.¹ The principle here is, that, the price being mentally fixed, the sale is good, whether the consideration be made payable in money or any thing else: the point of distinction between this and a barter or exchange being, that in the latter case the parties are supposed to have completed the transfer with no distinct apprehension of a money price applicable to the one article or the other.

On the whole, then, we conceive that, in the mental application of a distinct money valuation to the transfer, the requirement of a sale is satisfied, whether payment be made in money or any thing else. And with this qualification may be applied the rule as defined by Benjamin, who excludes from the law of sales all goods given in exchange for goods (or barter); goods given in consideration of work and labor

¹ *Herrick v. Carter*, 56 Barb. 41. And see *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101; *Flanagan v. Hutchinson*, 47 Mis. 237; *Hale v. Hays*, 54 N. Y. 389. *Humaston v. Am. Telegraph Co.*, 20 Wall. 20, is the case of a sale of property to be paid for in stock.

done; goods given for rent, or for board and lodging, or on any valuable consideration not money. These, he says, are all contracts for the transfer of the general and absolute property in the thing, but not sales of goods; admitting their legal effect, however, to be generally, but not always, the same as in sales.¹ We should say that all these are not sales, as simply balanced off against one another by way of mutual consideration; but that the rule of the transaction would be otherwise, were a price distinctly put upon the goods, even though the seller further agreed to take his pay in rent, labor, board, or other goods. As the civil law tersely expressed it: *Non enim pretii numeralio, sed conventio, perficit emptionem.*²

The price entering as an essential element into every contract of sale, it must be fixed, or else ascertainable from reference to the contract.³ Leases of land, it is well known, have often been made with a rental payable regularly in corn, — a commodity convenient for a standard, as retaining for long periods the same relative purchasable value. The market value of this and other products is ascertainable, at a given time, by reference to prices-current; nor is the rule of fixing a price essentially different, in a sale of goods for gold, at a time when depreciated legal-tender notes are in circulation; and yet a sale expressly payable in gold is doubtless a good sale. So, too, sales between merchants residing in different countries are carried on with the reference to rates of foreign exchange, the money standard of one country differing from that of another. In all of these cases there is a price sufficient to sustain the transfer as a sale, because, if not fixed, it is readily ascertainable from the contract. And

¹ Benj. Sales, bk. 1, pt. 1, c. 1; *Ib.* bk. 1, pt. 1, c. 5; *Keys v. Harwood*, 2 C. B. 905; *Hands v. Burton*, 9 East, 349; *Sheldon v. Cox*, 3 B. & C. 420. See *supra*, p. 187.

² See Story Sales, §§ 216-218.

³ 2 Kent Com. 447; Benj. Sales, bk. 1, pt. 1, c. 5; Story Sales, §§ 216-218; *Cunningham v. Ashbrook*, 20 Mis 553; *McConnell v. Hughes*, 29 Wis. 537.

where the contract furnishes a true test of the price, without the need of further negotiations between buyer and seller, the present requirement of law is fulfilled.

A striking illustration of the rule as concerns an ascertainable price is furnished by the Wisconsin case of *McConnell v. Hughes*. Here a quantity of wheat was bargained for at a price ten cents per bushel less than the Milwaukee price should be on any day thereafter that the seller should name, and delivery was made in pursuance of the bargain. The wheat was afterwards destroyed by fire, before the seller had named the day. The court held that the sale was nevertheless complete, that the property had passed to the buyer, and that the seller might name the day later and claim payment of his price accordingly. The option thus given to the seller was doubtless a large one, and objection had been taken at the trial that the contract specified neither a particular date nor a particular period for fixing the price. But the court replies: "The contract furnishes a criterion for ascertaining the price of the wheat; leaving nothing in relation thereto for further negotiation between the parties."¹

But where the contract of sale does not furnish the true criterion of price, and something remains to be done between buyer and seller for its ascertainment, there is no present sale, but, at most, only an executory agreement for a sale. Thus, in a sale of a hog on credit, to be kept by the seller until the buyer shall call for it, and then paid for at its market price, according to what it shall then weigh, there is no sufficient passing of property.² Other instances might be cited, of contracts to put property into a marketable condition and then weigh to ascertain the price, of agreeing to send property to the purchaser to take what he likes of it, and so on, where the test of price appears to have been postponed

¹ *McConnell v. Hughes*, 29 Wis. 537.

² *Rourke v. Bullens*, 8 Gray, 549.

so as to render the sale for the time being an imperfect one.¹ If parties leave the price to be fixed afterwards, and they finally fail to agree thereon, there is manifestly no complete sale of the property.² The legal result is not reached without a just view of the whole transaction and its import; the want of delivery being a prominent, though not conclusive, circumstance against regarding the transfer of property as complete, pending the final acts for definitely determining the price.³ Although acts remaining to be performed between buyer and seller, such as weighing and measuring the goods to ascertain the full price, commonly prevent the property from passing at once to the buyer, the rule is not invariable in this respect; and where, in fact, the goods are already separated and delivered upon fixed terms by a weight to be subsequently ascertained without further reference to the parties themselves, the sale will not fail for want of a price. Thus, the sale of an entire drove of cattle, at so many dollars per hundred-weight, to be delivered and killed and weighed by the buyer, may take effect on delivery as an executed sale before the cattle have been actually weighed.⁴ And a price may be sufficiently fixed upon to support the sale, notwithstanding the need of further arithmetical calculation.⁵

Sometimes the price is left by the parties to the decision of some third party; and if that party accepts the trust, and actually performs it in good faith, the essential of a price is fulfilled. But until the third person or valuer has fixed the price in accordance with such agreement of the parties, the

¹ Story Sales, § 220; *Simmons v. Swift*, 5 B. & C. 862; *Andrew v. Dieterich*, 14 Wend. 31.

² *Wittkowsky v. Wasson*, 71 N. C. 451.

³ See further, cs. 2, 3, *infra*.

⁴ *Cunningham v. Ashbrook*, 20 Mis. 553; *Crofoot v. Bennett*, 2 Comst. 258. See Story Sales, § 220; *Pothier Contrat de Vente*, No. 20; *Blackburn Sales*, 152; *Ward v. Shaw*, 7 Wend. 404; *Bigley v. Risher*, 63 Penn. St. 152; *Gray v. Millay*, 61 Me. 327.

⁵ *Tansley v. Turner*, 2 Scott, 238.

contract of sale is not perfect. Even though buyer or seller should himself prevent the valuation by prevailing upon the designated valuer not to accept the duty, there is, nevertheless, no sale.¹ But to obstruct or render impossible the valuation does not relieve the buyer from the obligations of the contract while affording him the advantages of a purchase; and where goods are delivered in pursuance of the original understanding, at a price to be fixed by valuers, and the valuers disagree, and the buyer consumes the goods, he is liable to the seller for such value as a jury may estimate reasonable.² On the other hand, a valuer, having once accepted the trust for compensation, is liable in damages to the bargaining parties for default or neglect of duty.³ Our law conforms, in respect of price to be fixed by a third person, to that of the Roman empire, as definitely established by Justinian himself, after a long period of controversy among the jurists; and in some of the modern Continental codes the same doctrine is clearly set forth.⁴

A purchase is frequently made without distinct mention of a price; as where one goes into a store, points out an article, and says he will take it, and possession is given accordingly. The transaction is a sale, nevertheless; for what was implied on delivery and acceptance was doubtless, on the buyer's part, a promise to pay what the thing was reasonably worth. The seller's regular price would, if fair, settle the question; otherwise not, unless the buyer had clearly meant to put himself into the seller's hands. To shield both parties in such mutual transactions, the law will usually

¹ *Benj. Sales*, bk. 1, pt. 1, c. 5; *Story Sales*, § 220; *Brown v. Bellows*, 4 Pick. 179; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Hutton v. Pearce*, 26 Ark. 382; *Fuller v. Bean*, 34 N. H. 304.

² *Clarke v. Westroppe*, 18 C. B. 765.

³ *Jenkins v. Beetham*, 15 C. B. 189. That such valuation is not "arbitration," see *Bos v. Helsham*, L. R. 2 Ex. 72.

⁴ *Dig. l. 3, tit. 23, § 1*; *Code Napoleon*, arts. 1591, 1592; *Benj. Sales*, bk. 1, pt. 1, c. 5.

regard the market price, and determine from all circumstances the reasonable worth of the thing sold, so that the seller may have his rights, but gain no unfair advantage. While, then, a price is essential to a sale, it may be implied as well as expressed. And that the reasonable worth of the property sold will be implied in every contract of sale where no price has been definitely fixed, is a rule now well settled, both with reference to goods already delivered and accepted, and goods ordered from the seller, and by him tendered for acceptance.¹ In this respect we appear to differ from the Roman law, which, it is said, made no inference of a reasonable price in absence of express agreement.²

By price is, of course, understood that the consideration computable on a money reckoning shall be in truth a valuable one. To sell for a nominal price, and, at the same time, absolve the buyer from payment, is but a sham sale: it is properly a gift. But in cases free from fraud, force, or palpable error, and with especial reference to the bargaining parties, and not to the creditors of either, the common law deems any sale for a price good, notwithstanding mere inadequacy. An equivalent for the thing is not needful; it is enough that there has been an actual price put upon it.³ The Roman law appears, however, to have been different, in permitting any sale for one-half of the value of the property, or less, to be impeached as inadequate in price.⁴

¹ Story Sales, § 221; *Acebal v. Levy*, 10 Bing. 376; *Hoadly v. M'Laine*, 10 Bing. 487; Benj. Sales, bk. 1, pt. 2, c. 5; *Joyce v. Swann*, 17 C. B. N. S. 84; *McCandlish v. Newman*, 22 Penn. St. 460; *McEwen v. Morey*, 60 Ill. 32. As to what is meant by a reasonable price, it is said in *Acebal v. Levy*, *supra*, that the reasonable price may or may not agree with the current price; for the current price might be highly unreasonable, from accidental circumstance.

² Dig. 18, I. De Contrah. Empt. 7, §§ 1, 2; Benj. Sales, bk. 2, c. 7.

³ Story Sales, §§ 223, 224.

⁴ 1 Dom. Civ. Law, pt. 1, bk. 1, tit. 2, § 3, art. 1; Pothier Contrat de Vente, No. 20. See, as to fraudulent and illegal sales, *post*.

(3d.) There must be mutual assent to the transfer of the thing at the price. This brings us at once to the point, that mutual assent must apply to the particular subject-matter of a sale, so as to make it not an existing thing alone, but the same existing thing as viewed by buyer and seller alike. If, then, the buyer contracts for one thing, while the seller understands quite another, a prime essential to a valid sale is wanting. Thus, if "long-staple Salem cotton" be the thing ordered, there is no mutuality in subject-matter, and, consequently, no sale, where the seller supposes the order different, and supplies instead "western Madras cotton," — a species of cotton inferior, of less value, and requiring different machinery for its manufacture.¹ Where an unexpired lease of eight years is bargained for, and the lease, though of the premises in question, proves, when produced, to have only six years to run, the bargain is, likewise, void for the same reason.² Again, where a buyer orders three rifles, and, through a mistake, for which neither he nor the seller is responsible, the seller assents to the sale as one of fifty rifles, there is a want of mutuality in the contract.³ And while, as will more fully appear hereafter, a mere failure in quality of the subject-matter contracted for would not vitiate the sale, any thing bargained and sold as being of a particular description implies a contract between the parties that the subject-matter answers that description, both as to kind and quantity.⁴

If one purchases as a "perpetual-motion machine" something valuable to him only because affording what he supposes the solution of a puzzling problem, the sale fails, though

¹ *Azèmar v. Casella*, L. R. 2 C. P. 431. And see *Thornton v. Kempster*, 5 Taunt. 786.

² *Farrar v. Nightingale*, 2 Esp. 139.

³ *Henkel v. Pape*, L. R. 6 Ex. 7; *Smith v. Lewis*, 40 Ind. 98.

⁴ See *Barr v. Gibson*, 3 M. & W. 390; and as to warranty, *post*.

the identical machine be delivered, on proof that the pretended mechanical effect is a mere trick of hidden clock-work.¹ In general, since the principle of a product is an object of sale, apart from the product itself, there should be mutuality in transfers of either; for the sale of a patent-right or a copyright is quite different from the sale of a machine, or a load of books embodying the ideas.² But it is a general rule, that, in the absence of special warranty by the seller, or actual fraud, a bargain is binding, notwithstanding the want of mutual assent upon some matter of collateral description not vital to the contract. The sale, strictly according to a sample, is good, though the sample shown was believed by the buyer to represent a kind or quality which it did not; a corresponding rule applying sometimes to the seller's disadvantage. For if the parties are *ad idem* on the subject-matter sold, the self-deception of one concerning its intrinsic value, unless induced by the other's fraud, cannot impair the obligations of the contract.³

The employment of fraud or force would render the sale voidable on the ordinary principle; as to error, this must go to the essentials. The misunderstanding of words and their import, as where the buyer is a foreigner, and unfamiliar with the language spoken by the seller, may prevent the *aggregatio mentium* needful for mutual assent; and so, perhaps, mistake as to the identity of the party bargained with, though such error could hardly be deemed fundamental unless the sale were on credit, nor is a case readily supposable at all, without imputing either fraud to the one or gross carelessness to the other party.⁴

¹ Kendall v. Wilson, 41 Vt. 567.

² 1 Sch. Pers. Prop. 654, 675.

³ Smith v. Hughes, L. R. 6 Q. B. 579; Scott v. Littledale, 8 E. & B. 215; Ollivant v. Bayley, 5 Q. B. 288.

⁴ Boulton v. Jones, 2 H. & N. 564; Phillips v. Bistolli, 2 B. & C. 511; Benj. Sales, bk. 1, pt. 1, c. 3, § 1; Story Sales, §§ 137, 138; Barker v. Dinsmore, 72 Penn. St. 427.

In repudiating transactions of this character, — especially those which display, not the element of fraud and force, but rather that of honest mutual error, — the courts frequently take the position that the sale contract in question contained an implied condition which has failed, or an implied warranty of the thing's existence, and title in the seller, or a failure of consideration in the contract of sale.¹ Yet the preferable and quite sufficient ground of repudiation appears to be, that an essential element in the sale was wanting; namely, a subject-matter, or at all events the particular subject-matter, of a mutual assent between buyer and seller. Instead of pronouncing, then, that an executed contract of sale had thus failed, the courts might better say that no contract was ever really executed.²

The next point noticeable is, that there must be not only a price, but a particular price, to which both seller and buyer assent. It is too clear for argument, that if the one says, "I will sell you these goods for one hundred dollars," and the other responds, "All right: I will take them for eighty dollars," — there is no mutuality in price, and consequently no sale. And where, in the absence of a price expressly named, the law infers, as we have seen, a contract for a reasonable price, this is out of deference to the presumed mutual intention of the parties; for should the evidence in any case rebut such a presumption, the rule would doubtless fail of application.³

And now concerning mutual assent to a sale, in its more general aspects. Mutual assent enters as an element into every contract. There need be no particular form of assent;

¹ See *post*, c. as to fraudulent sales.

² Mr. Benjamin is of this opinion, and cites Lord Kenyon and Pothier in its support. *Benj. Sales*, bk. 1, pt. 1, c. 4; *Farrar v. Nightingale*, 2 Esp. 139; *Pothier Contrat de Vente*, No. 4.

³ *Supra*, p. 200; *Felthouse v. Bindley*, 11 C. B. N. s. 869.

it may be express or implied. Among different nations, and in different stages of society, peculiar solemnities of ratification have attended sale transactions. Thus, among the Jews a bargain was confirmed by taking off the shoe and handing it over. The Romans used to interchange a ring for the same purpose. Shaking hands on a bargain, and crossing the palm with a coin, were Anglo-Saxon customs, once honored, and not even yet forgotten; while the Statute of Frauds embalms that old-fashioned ceremony of giving a piece of money as earnest of a bargain, now fallen into general disuse.¹ Any sign which is intelligible to the parties concerned — a pantomime among the deaf and dumb, a nod or gesture between buyer and seller expressing yes or no — may serve as the undoubted expression of mutual assent. A man goes into a shop, takes up an article from the counter, and walks out with it, — nothing more passing between him and the shopkeeper than a glance of mutual recognition; and yet upon such slight circumstances depend the validity of numberless transactions of our every-day life. Mutual assent, then, in sales, is a matter of inference from the conduct of parties and the surrounding circumstances; usually expressed by both acts and words, it is true, but not necessarily.

Negotiations are often conducted in writing; besides which there have been solemnities peculiar to the transfer of lands and of certain kinds of personal property, particularly incorporeal chattels. But as to most corporeal chattels, such as goods and merchandise, the law of bargain and sale requires no writing whatever to complete the contract between the parties, except so far as may be found necessary for legal compliance with the Statute of Frauds. The writings, if any, which are otherwise pertinent to the transaction, are those only upon which the bargain and transfer of property were

¹ See Story Sales, § 125; Browne Stat. Frauds, § 341; Benj. Sales, bk. 1, pt. 1, c. 3, § 1; 2 Bl. Com. 443; *Bach v. Owen*, 5 T. R. 409.

based; and all subsequent memoranda or bills of sale, though bearing, it may be, testimony of a contract already executed, cannot annul or vary the bargain. For our law contemplates no act or ceremony for ratifying and confirming these common sales of personal property: the expression of mutual assent to the thing at the price affording its own ratification, so that bills of sale are often like receipts, open to explanation, and by no means conclusive as to the terms of a bargain.¹

A bargain, when reduced to its simplest elements, is found to consist of a proposal, or offer, made on one side, and accepted on the other. The proposal as made should be distinct and clear, and its acceptance should be correspondingly clear, full, and unequivocal. If the acceptance falls short of the offer, or seeks to expand it, negotiations may continue; but there is as yet no mutual assent and no bargain.² Thus, where A offers to buy a mare if warranted "sound, and quiet in harness," and B sends the mare with a warranty that she is "sound and quiet in *double* harness," the sale is incomplete.³ And even a proposal to sell a lot of "good barley" is held to be insufficiently accepted as a lot of "fine barley and full weight;"⁴ this, however, out of regard to the significance of commercial terms denoting different species of the same article; for a slight variance in words is of little consequence, provided the two parties clearly refer to the same subject-matter in the same sense.⁵ But, as with other contracts, so is it with bargain and sale,—an acceptance, so soon as it is communicated to the purchasing party, which

¹ Schuchardt v. Allens, 1 Wall. 359; Terry v. Wheeler, 25 N. Y. 520; Gatzweiler v. Morgner, 51 Mis. 47; McCrae v. Young, 43 Ala. 622.

² Benj. Sales, bk. 1, pt. 1, c. 3, § 1; Story Sales, § 125; Carr v. Duvall, 14 Pet. 77; 2 Kent Com. 477; 1 Pars. Contr. 399, 400.

³ Jordan v. Norton, 4 M. & W. 155.

⁴ Hutchinson v. Bowker, 5 M. & W. 535. And see Chicago, &c. R. R. Co. v. Dana, 43 N. Y. 240.

⁵ Hartford & N. H. R. R. Co. v. Jackson, 24 Conn. 514.

exactly closes at all points with the offer, renders the contract complete and binding upon both parties.¹

All bargains, to be complete, are mutual and reciprocal; both parties must be bound, and not one alone. All this is implied in the act, of mutual assent, which, however grudgingly given on either side, must be pronounced voluntary, if given understandingly. And the contract of sale once completed, it is out of the power of one party to change or rescind it thenceforth, without the consent of the other.²

But negotiations which terminate in a complete bargain and sale often consist of a series of proposals and counter-proposals, whose final result must be gathered from an examination of the whole transaction, from beginning to end. Here the points embraced under a mutual assent must be brought together, however scattered, and the meeting of the minds on each will establish the contract in its full import. And the rule is, that if the party to whom an offer is made adds a condition, or modifies the proposal in any way, this amounts in law to a new proposal, which must be in turn accepted by the party previously proposing, before the bargain can stand complete.³

It is also a rule that one who makes a proposal may withdraw it at any time before the other party has accepted the offer and communicated such acceptance to him, or to whatever party the law would denominate his agent.⁴

Bargains are frequently carried on by written correspondence: this method being found almost indispensable for facil-

¹ *Benj. Sales*, bk. 1, pt. 1, c. 3, § 1; *Story Sales*, § 125; 2 *Kent Com.* 447; 1 *Pars. Contr.* 399, 400.

² *Ib.*; *Schuchardt v. Allens*, 1 *Wall.* 359; *Joyce v. Swann*, 17 *C. B. N. S.* 84.

³ *Benj. Sales*, bk. 1, pt. 1, c. 3, § 1; *Champion v. Short*, 1 *Camp.* 63; *Chaplin v. Clarke*, 4 *Ex.* 403; *Jackson v. Turquand*, *L. R.* 4 *H. L.* 305; *Potts v. Whitehead*, 8 *C. E. Green*, 512; 1 *Pars. Contr.* 400.

⁴ *Hebb's Case*, *L. R.* 4 *Eq.* 9; *Benj. Sales*, bk. 1, pt. 1, c. 3, § 1.

itating business between parties who are far apart, and generally convenient as a means of preserving in a permanent form the exact terms of any contract. Now, it may tend to simplify the question, as to letters transmitted by mail, to consider the post-office as the common agent of the parties, though not without making allowance for the peculiar mode of negotiation thus adopted by them.¹ An offer having been made, then, through the mail, the proposing party may be regarded as tendering by implication the post-office, through that particular mail, his own messenger, to be used as the common agent for a response, and hence as awaiting a reply by bearer. If the party making the offer desires afterwards to retract or modify it, he may overtake his messenger, that is, mail another letter of suitable tenor, which letter must be regarded, with reference to the party addressed, as postponed to the former letter, and the effect made to depend upon its reaching him in due course before he has transmitted his reply to the former letter through the agent; for an authority revocable in itself is not revoked without notice to the other party. Let us now turn to the party to whom the proposal was made. The first letter comes to him in due course through the sender's agent, — the post-office, — and he becomes at liberty to accept or decline seasonably through the same agent. If he posts his reply of acceptance accordingly with proper care, the vendee's agent receives it as the common agent; and whether the letter finally reach the proposer or not, the mutual assent has been given, and the bargain is struck. But if the correspondent delays, and meantime notice of retraction of the offer reaches him before his own reply has been posted, the withdrawal takes effect, and there is no bargain between the parties. The principle upon which bargains by correspondence are decided, is, however, usually stated rather differently; namely, in effect, that the

¹ See Romilly, M. R., in *Hebb's Case*, *supra*.

law infers a continuing offer on the part of him who first posts his proposition until it shall have reached the correspondent, to be by him in due time accepted or rejected; and that on the part of the correspondent there is an overt act amounting to acceptance or rejection when he has within due time placed his reply in the mail.¹

The necessity of the case, in either view, justifies the rule as a sound one; for, as it has been well observed, "In all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. . . . The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence. The acceptance must succeed the offer after the lapse of some interval of time, and if the process is to be carried further, in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from one party to the other."²

A bargain carried on by correspondence is, therefore, struck, when the party receiving the proposal by mail, in due season, and before receiving any notice withdrawing the proposal, posts his letter of acceptance. The posting of a letter, under such circumstances, binds the proposer at once; and it binds the accepting party as well, who is, consequently, not at liberty to retract the assent thus given, whether his own letter has already reached the proposer or not.³ In fact, the tenor of this reply settles for the time the question of accept-

¹ See *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390.

² Nelson, J., in *Tayloe v. Merchants' Fire Ins. Co.*, *supra*.

³ *Benj. Sales*, bk. 1, pt. 1, c. 3, § 1; *Story Sales*, § 129; *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Tayloe*

ance or rejection. Accident or delay of transmission in the post-office, whether as to the offer or the reply, does not affect the right of the one to duly consider and accept the proposal made, or of the other to profit by such acceptance; and if, through a misdirection by the proposing party, the letter with its offer fails to reach the correspondent in due course of mail, the latter may promptly return his reply, having as yet received no notice of the proposer's withdrawal. The mailing of a second letter by the proposing party, retracting his proposal, cannot avail him, if in due season after receiving the first letter and before receiving the second, the party to whom the proposal was addressed has mailed his letter of acceptance.¹ Nor would any detention or loss of the letter of acceptance in the mails, if it be through no misdirection or other fault on his part, affect the bargain once concluded.²

But the question still remains open, how far the party proposing is allowed to overtake the letter he first mailed, and, by bringing his retraction of the offer to the notice of the other party before the latter has mailed an acceptance, prevent the bargain from taking place. Leaving out mail detentions, through the fault of the one or the other, we should say, that, wherever the proposing party can thus anticipate his correspondent's act of acceptance, the proposal fails. Our courts do not seem to have met the question openly as yet, though they intimate as much.³ As to the accepting party,

v. Merchants' Fire Ins. Co., 9 How. (U. S.) 390; *Mactier v. Frith*, 6 Wend. 103; 2 Kent Com. 477; 1 Pars. Contr. 404-408; *Harris' Case*, L. R. 7 Ch. 587; *Averill v. Hedge*, 12 Conn. 436; *Abbott v. Shepard*, 48 N. H. 14; *Vassar v. Camp*, 1 Kern. 441; *Wheat v. Cross*, 31 Md. 99; *Potts v. Whitehead*, 8 C. E. Green, 512. *Contra*, *M'Culloch v. Eagle Ins. Co.*, 1 Pick. 283, now repudiated.

¹ *Harris' Case*, L. R. 7 Ch. 587; *Tayloe v. Merchants' Fire Ins. Co.*, and other cases *supra*.

² *Vassar v. Camp*, 1 Kern. 441; *Adams v. Lindsell*, 1 B. & Ald. 681; *Hallock v. Commercial Ins. Co.*, 2 Dutch. 268.

³ See *Adams v. Lindsell*, 1 B. & Ald. 681; *Harris' Case*, L. R. 7 Ch.

however, the reason of the rule would put it out of his power to recall the terms of his acceptance once confided to the post; and such is declared to be the English and American doctrine.¹ But there is an extreme case, reported among the Scotch decisions, where, in accordance with civil-law principles, a majority of the court held that, the acceptor having mailed a later letter recalling his acceptance, and both letters reaching the original proposer at the same time, the latter could not be forced to perform the bargain.²

The civil-law rule as to bargain by correspondence appears to be different from ours; for, according to Pothier and others, if the person making the offer retract it before the letter of acceptance is placed in the post, the retraction failing, however, to reach the acceptor until afterwards, no binding contract would arise. But to save the acceptor from disastrous consequences, the further rule prevailed, that, if loss or injury should arise from the acceptor's acting under the contract as a completed one, he might claim indemnity from the party making the offer. This doctrine, though praised by Mr. Story as the fairest and most intelligible rule that can be found, has never been put, in England or America, to practical test; and, if it were, serious objections would probably be found to its operation, inasmuch as it renders the bargain itself too uncertain of execution, besides sacrificing, for the acceptor's benefit, the rights of one who certainly ought not, in withdrawing his offer for good cause, to stand worse off than though his offer had been accepted.³

587; Nelson, J., in *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390; *Mactier v. Frith*, 6 Wend. 104.

¹ *Ib.*; *Hallock v. Commercial Ins. Co.*, 2 Dutch. 268, *per* Vredenburg, J.; *Harris' Case*, L. R. 7 Ch. 587, criticising *British, &c. Tel. Co. v. Colson*, L. R. 6 Ex. 108.

² *Dunmore v. Alexander*, 9 Shaw & Dunlop, 190; *Merlin Repert. Vente*, § 1, art. 3, No. 11; *Benj. Sales*, bk. 1, pt. 1, c. 3, § 2.

³ *Story Sales*, § 130; *Pothier Contrat de Vente*, No. 32. Mr. Benjamin has put the objections strongly, in *Benj. Sales*, bk. 1, pt. 1, c. 3, § 2

The rule as to bargains by messages sent through some other channel than the post-office would probably be substantially the same as that of mail correspondence. Thus, if an express or special messenger bore the proposal, it would be for the proposer to overtake his own agent in season with a retraction of the offer, or a revocation of authority ; while, as may well be presumed, the bargain would stand complete the moment a reply of acceptance had been placed in the messenger's hands by the party addressed ; the latter, however, in case he returned answer by some other medium, being viewed by the law as a principal sending back his own agent.¹ The telegraph, which in this later day is so available for bargains, introduces some novel considerations into the law of correspondence, by bringing distant parties as it were face to face in the execution of their mutual contracts. A reply sent by telegraph to an offer received by telegraph, or even to a proposal requesting a telegraphic response, closes the bargain if it signifies acceptance ; no matter when the message reaches the proposer himself. But when either party selects mail or telegraph on his own responsibility, with no previous authority from the other, the consequence may be different ; for, on the principle of agency, one ought to be allowed to overtake his own messenger before the message is delivered. For a proposing party to revoke by telegram an offer on its way by mail, is like sending a swift agent to catch up with and outstrip a slow one ; and notice of revocation thus sent is doubtless available if it anticipates the reply first invited.² In all this, the general law of correspondence is amplified, not altered. The agency, moreover, which a telegraph company furnishes when employed is not so complete as to bind the sender by the terms of a message which he never authorized, and which, through the mistake of the transmitting tele-

¹ See *Hebb's Case*, L. R. 4 Eq. 9 ; *Story Agency*, § 470.

² See *Trevor v. Wood*, 36 N. Y. 307 ; *Hallock v. Insurance Co.*, 2 Dutch. 268, 281, *per curiam* ; *Duble v. Batts*, 28 Tex. 312.

graph operator, reaches the party addressed in the shape of an offer quite different from that really made ; the substantial effect being no bargain for the want of an *aggregatio mentium* as to the parties, but remedies against the telegraph company for any injury suffered by its carelessness.¹

Limitations as to place and time of acceptance are sometimes imposed by the party who makes a proposal ; and to these, like all other terms embraced by an offer, the party addressed is expected to conform. Any qualification of or departure from these terms invalidates the offer, unless in turn accepted by the party first proposing ; such acceptance being, however, inferable from circumstances.

Thus, as to place ; if the proposing party direct an answer to be communicated to him at a particular place, an acceptance communicated to him by address sent elsewhere imposes *per se* no obligation.²

As to time, there is always a legal limit ; and where nothing is expressed, it is to be understood that the proposal requires an acceptance within a reasonable time to make the bargain binding. Usage of trade, the circumstances and situation of the parties, as being near or far apart, will determine how long a time should be considered reasonable. Ordinarily, a seller's proposition made in presence of the buyer should be accepted by the latter on the spot or at the same interview, though their mutual acts and conduct might raise the presumption that a longer period was given for the buyer to decide.³

Whether the cardinal principle that one may withdraw his offer at any moment before its acceptance — a principle not

¹ *Henkel v. Pape*, L. R. 6 Ex. 7. For a similar Scotch decision, see *Verdin v. Robertson*, 10 Sess. Cas. 3d series, 35.

² *Eliason v. Henshaw*, 4 Wheat. 225 ; *Carr v. Duval*, 14 Pet. 77.

³ *Story Sales*, § 126 ; *Craig v. Harper*, 3 Cush. 158 ; *Beckwith v. Cheever*, 21 N. H. 41 ; *Martin v. Black*, 21 Ala. 721.

essentially varied, even in the case of negotiations by letter — should extend to cases where the proposer has left a definite time open for the acceptance of his proposal, has been a matter of much controversy. One who leaves his offer to be thus accepted does a gracious thing by the other party; and most assuredly, when the time has elapsed without bringing an answer, he is free to consider the offer withdrawn, and discard any later acceptance.¹ But is he hampered at all, beyond the moral obligation of making good his word? For there can be little mutuality in a contract which restrains one from selling his wares to the next customer at his own price, while the former party is permitted, after trying to make a cheaper bargain elsewhere while keeping this as his last resort in case he decides to purchase at all, to leave the seller in the lurch altogether. Now, upon this want of mutuality, and the gratuitous nature of the contract, rests a rule of the courts, which refuses to hold the proposer bound to any stated limit of time, except so far as the offer may remain in law a continuous one, and as such be accepted within the period and before notice of its final withdrawal.

Cooke v. Oxley, the leading case on the subject, which was decided before Lord Kenyon, presented a somewhat singular state of facts. A. had proposed to sell and deliver certain goods to B. on certain terms, if B. would agree to purchase on these terms, and would give notice thereof to A. before four o'clock in the afternoon of the same day. B. agreed to this, and gave notice before the time had elapsed; but A. would not carry out the agreement; and in this the court sustained him. Nothing, said Chief Justice Kenyon, could be clearer than that the engagement was all on one side, the other party not being bound; and hence the 'agreement was *nudum pactum*. Judge Buller adverted to the circumstance that here was neither a damage to the one, nor an advan-

¹ See *Potts v. Whitehead*, 5 C. E. Green, 55, 59, *per curiam*.

tage to the other. The further suggestion was thrown out by certain of the judges, that at a certain point of time — say at four o'clock — the parties might have come to an agreement of sale, in which case the later agreement, and not that really sued upon, would have been the decisive one; but of this no evidence was furnished.¹ The principle of the decision in *Cooke v. Oxley* is followed in later English and American cases, where the actual retraction of a continuous offer on time by the proposer within the period stated has been upheld so as to defeat subsequent acceptance and a bargain, as where wool is offered at sale on three days' option to purchase; or a party looking at a house has been promised by the owner six weeks to make up his mind.² "Unless both parties are bound," says Bayley, J., "neither is."³

The brunt of a vigorous attack by certain writers upon the rule, now well fortified, which protects a proposer in withdrawing his time offer before its actual acceptance within the period agreed upon, has been borne by *Cooke v. Oxley*, a case whose facts might well be misapprehended; for had there been proof of an offer left open which the buyer before four in the afternoon accepted, and the seller, having already the opportunity to withdraw, had not previously withdrawn, the decision in question might have been different. In fact, the acceptance of a time offer within the time, and before retraction, makes a complete bargain.⁴ We need hardly add that any supposed discrepancy between *Cooke v. Oxley* and the post-office cases is quite fanciful; it was really upon the

¹ *Cooke v. Oxley*, 3 T. R. 653.

² *Benj. Sales*, bk. 1, pt. 1, c. 3, § 1; *Story Sales*, § 126; *Head v. Diggon*, 3 M. & R. 97; *Routledge v. Grant*, 4 Bing. 653; *Humphries v. Carvalho*, 16 East, 45; *Eskridge v. Glover*, 5 Stew. & Port. 264; *Faulkner v. Heberd*, 26 Vt. 452; *Beckwith v. Cheever*, 21 N. H. 41; *Chicago, &c. R. R. Co. v. Dana*, 43 N. Y. 240.

³ *Head v. Diggon*, 3 M. & R. 97.

⁴ See *Boston & Maine R. R. Co. v. Bartlett*, 3 Cush. 224.

lack of proof before the court that the plaintiff there failed beyond a peradventure.¹ And on this ground, meeting Mr. Story, Toullier, Bell, and other writers who stand opposed to the English judicial doctrine of offers on a specified time, one may answer their legal objections. Mr. Story suggests that a consideration sufficient to sustain such a promise may be found either in the expectation or hope on the part of the proposer that his offer will be accepted, or in the inconvenience which is occasioned to the other party, if betrayed into a loss of time or money by the inducement given him to make examination and to inquire into the value of the goods offered.² But, as to the first, any such expectation or hope of the proposer must be the offspring of his own fancy, since the other party does not really undertake to gratify any expectation of the sort, and, on the contrary, need never seriously turn the offer over in his own mind; and, secondly, as to the possible damage caused the other party by inducing him to examine and inquire, that could only apply, if at all, to cases where the damage thus induced could be actually shown. If, too, the latter party is not sufficiently warned against incurring loss by his knowledge that any offer made on time may nevertheless be withdrawn and has no legal force, and if the damage incurred by him, being more than a possibility and something actual, could in truth furnish a legal consideration so as to bind the bargain, why, on the other hand, might not a proposer, who had incurred expense on the supposition that his proposition would be accepted, hold the other party bound for inducing the expectation of acceptance, whenever that party had, though promising to consider the offer, let it drop without further thought? Hope and induce-

¹ See *Adams v. Lindsell*, 1 B. & Ald. 681, as explained by Best, C. J., in *Routledge v. Grant*, 4 Bing. 653.

² Story Sales, § 127, citing 6 Toullier Droit Civil Français, p. 33, No. 30; 1 Stair, 3, 9; 1 Duer Ins. 118; Bell Sales, 27. See comments in Benj. Sales, bk. 1, pt. 1, c. 3, § 1.

ment, indeed, are not all on one side in a bargain ; and that is worth remembering when the further objection of encouraging bad faith is imputed to the courts. The assailable part of this doctrine is undoubtedly in its denying the legal force of a moral promise ; but to undertake enforcing contracts which rest upon moral and not legal consideration has ever been beyond the province of tribunals with imperfect means of gauging human motives.

Since a contract of sale may be implied from the conduct of the parties, as well as expressed, it follows that mutual assent to a first proposal, or its subsequent modifications, is inferable from circumstances. Thus, if one thing is ordered and another sent, and the party who gave the order takes and consumes the article delivered instead of promptly rejecting and sending it back, the bargain becomes complete, on the presumption of a contract growing out of subsequent mutual assent to the sale of what was actually supplied. Wherever it is incumbent upon a party to express his dissent, his silence will not prevent the incurring of an obligation ; and, be it as an honest buyer or an embezzler, he ought to be held responsible for property of another which he has knowingly suffered to remain thrown upon his hands as though accepted for his own.¹

But the rule of New York is thought to be somewhat different, going to the extent of maintaining that where a party delivers part only of what he has agreed to deliver for a certain price by a given time, he cannot sue and recover *pro rata* for that portion, though the other party uses and consumes it.² This, however, would appear to be on a principle, reasonable in itself, and elsewhere recognized, that what one

¹ Story Sales, § 126 ; Benj. Sales, bk. 1, pt. 1, c. 3, § 1 ; Oxendale v. Wetherell, 9 B. & C. 386 ; Richardson v. Dunn, 2 Q. B. 222 ; Hart v. Mills, 15 M. & W. 85 ; Haines v. Tucker, 50 N. H. 307.

² Kein v. Tupper, 52 N. Y. 550, 555, *per* Church, C. J. ; Tipton v. Feitner, 20 N. Y. 423.

contracting party has suffered by the default or breach of the other is a proper subject of set-off in suit brought by the latter to recover ; and, indeed, a sufficient cause of action on his own part.¹ That a buyer who, by his acts and conduct, accepts delivery of a part for the whole, or of one thing in place of another ordered from the seller, should be utterly unaccountable therefor, is unreasonable and absurd.

Sales are not always absolute : the acceptance is sometimes made conditional, and delivery given accordingly ; and then no complete execution of the contract can take place until the condition is fulfilled. Instances of this are found in sales "on trial," and the bargain of "sale or return," to be hereafter examined. Qualifications introduced into a bargain raise perplexing questions of title ; conditions precedent, however, preventing a transfer, while subsequent conditions would subject the completed transfer to possible defeat.²

Under a contract of sale which gives the seller the right to repurchase on giving a prescribed notice, — such as a three-months' notice, — it is held that giving the notice does not constitute a present repurchase, but an engagement to repurchase ; and that if the property be destroyed after the notice was given, but before the expiration of the period, the notifying party is not liable.³

A written contract usually merges all previous oral stipulations, and is not to be enlarged or limited by parol. So where any bargain has been consummated by a memorandum or negotiated by correspondence, the mutual intent will be gathered by the court upon inspection of all the papers. Language of itself unintelligible cannot avail in any such written contract ; but the court will correct obvious errors

¹ See *Horn v. Batchelder*, 41 N. H. 86 ; *Bowker v. Hoyt*, 18 Pick. 555 ; *Wilson v. Wagar*, 26 Mich. 452. And see remedies, *post*.

² Benj. Sales, bk. 1, pt. 1, c. 3, § 1 ; Story Sales, §§ 128, 136.

³ *Reitz's Appeal*, 64 Penn. St. 162.

and supply omissions upon proper evidence; and, in fine, make the agreement intelligible as it stands.¹ In this, as in most other respects, the law of mutual assent applicable to bargain and sale is part of the ordinary law of contracts; and it would appear that writings of this character will more readily be construed into an actual sale than an executory agreement to sell, there being nothing in the transaction to indicate a different intent.²

¹ Story Sales, § 137; Benj. Sales, bk. 1, pt. 1, c. 3, § 1; *Wilson v. Wilson*, 5 H. L. 40; *Guthing v. Lynn*, 2 B. & Ad. 232; *Merriam v. Field*, 29 Wis. 592; *Smith v. Dallas*, 35 Ind. 255; *Kelly v. Roberts*, 40 N. Y. 432; *Colt v. Cone*, 107 Mass. 285.

² *McCrae v. Young*, 43 Ala. 622; *Martin v. Adams*, 104 Mass. 262.

CHAPTER II.

TRANSFER OF PROPERTY RIGHT IN SPECIFIC CHATTELS.

IN every contract of sale there is a certain point at which a transfer of property takes place from seller to buyer, the rights and responsibilities of ownership becoming shifted accordingly. This point is readily perceptible in the very simple case of a cash sale made at a store counter, where the customer enters, selects his goods, pays for them, and carries them out. Should those goods be injured, destroyed, or stolen ever so soon after he has set foot in the street again, the loss is his own; or should some chance immediately occur for selling them at a profit upon their cost, the opportunity is for his benefit to seize or let slip, — all this from the very obvious circumstance that the customer has become the owner. But while the same doctrine holds perfectly good under other circumstances, the facts which may attend a sale are so various that the courts must separate the meshes of a complicated network with great delicacy oftentimes, in order to discover just where that transition point lies. Thus, instead of a sale for cash on delivery, there may have been a sale on credit, the customer receiving his goods under an agreement to defer payment; or the customer may have paid on the spot, with the understanding that the goods shall be sent to his address; or a bargain may have been struck, and nothing said concerning payment of price and delivery; or the terms of the purchase may have contemplated some further act on the part of buyer or seller, or a third person, such as weighing, counting, or measuring the goods; or, to becloud the issue still more completely, the contract of sale might relate to

goods which have as yet no existence, but must be manufactured to order, or which, already in being as part of a lump or mass, need to be separated and set apart before there can be identical and specific property for the contract to operate upon.

Whatever the aspect presented by a contract of sale, the whole law concerning its effect in transferring the rights and liabilities of ownership pivots upon this, — that the mutual intention of the parties to the contract is to be studied out, and, if not found unlawful, allowed to operate. Any thing short of this doctrine is mere presumption, liable to rebuttal, and legal rules are but ancillary to the investigation of a cardinal fact. But even when reduced to the question of intention, the solution of the problem of ownership is by no means easy, while the practical results arrived at, for the purpose of any intelligent and comprehensive system of rules, must needs be discordant. Mercantile transactions task the keenest wit and ingenuity ; and, intent themselves on the pursuit of gain, men are constantly interweaving new webs, and then coming into the courts to get them unravelled. Price, subject-matter, and mutual assent, the essentials of a bargain, the parties may well comprehend ; but just how and when their assent to the sale shall accomplish a transfer of property, they do not so clearly bring to their own minds. The buyer wants to get the goods into his own hands, and, as to payment, let the seller take his chances ; the seller means to flatter the buyer to the utmost in displaying a confidence in his honor and solvency, while the clutch of his hand upon those goods is not readily lost in the mean time, however well concealed from sight ; and if through some casualty the goods perish before the last stage of performance is attained, neither party desires to be owner in sustaining the loss. Each party being naturally eager then to reap all the advantages and shirk all the burdens of a contract whose full scope was probably not brought within the clear range of their mutual vision, how

difficult must it be for a court to apply an inflexible rule, or juries to agree upon consistent verdicts. To this inherent difficulty we must continually recur in the examination of all cases where the legal effect of a sale contract, executed or executory, is brought under discussion. Nor is a certain bias of court and jury, which appears traceable in various reported decisions, unworthy of a passing remark ; namely, against the presumed intention of complete transfer, wherever the natural result of litigation would be to give the buyer the benefit of goods for which he can never pay, or leave the seller to enjoy the purchase-money advanced for goods which he has never delivered.¹

Writers on the English law of sales distinguish between an executory contract of sale and a full bargain and sale ; in other words, between an agreement to transfer goods whose effect in changing the property thereto is yet postponed to further acts contemplated in the agreement, and that which of itself amounts to such a transfer of property, whether further acts, as, for instance, delivery on the payment of price, remain to be performed or no.² These two things, the executory contract of sale and the absolute or executed sale, are attended with different consequences of ownership. When contrasting the executory contract of sale with the executed bargain and sale, it is proper that an executed or absolute sale should be further distinguished from an executed contract of sale. A sale may be complete so far as transferring the property right is concerned, notwithstanding further acts, such as delivery or payment of the price, remain to be done in order to render the execution of the contract, as such, complete. An executed sale, therefore, may be understood to mean a sale where nothing remains to be done by either

¹ See, *e. g.*, *Littledale, J.*, in *Simmons v. Swift*, 5 B. & C. 857, referring to *Hanson v. Meyer*, 6 East, 614; *Haldeman v. Duncan*, 51 Penn. St. 66.

² See *Benj. Sales*, bk. 2, c. 1; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Story Sales*, § 232; *Blackburn Sales*, 147-149.

party to accomplish the transfer of property : but by an executed contract of sale is properly signified that the transaction is finished throughout ; the thing delivered, the price paid, and the agreement which incidentally carries the property over, fully performed on both sides.¹ The result appears in giving to the executory contract of sale a sense broader or narrower, according to circumstances, — a transfer of property being sometimes its consequence, and sometimes only its incident.

Mr. Story says that by the Roman law there is no distinction made between an executory contract of sale and an absolute sale ; any agreement to transfer goods on the one side and to pay for them on the other being a complete sale with transfer of the *jus in re* ; and he thinks that towards this conclusion our own jurisprudence is now tending, the former rigor of the common law of sales becoming relaxed in that respect.² But the Roman law of sales, it should be added, was quite artificial ; it differed at different stages of Roman history ; and the modern civil law has departed from it in many particulars. The discovery, in 1816, of a manuscript copy of the Institutes of Gaius, upon which work the celebrated compilations of Justinian's age were founded, has given later writers the advantage over Pothier, Domat, and other eminent civilians of the last century. And it would appear, in the light of the evidence now accessible, that the sale contract of the Roman law was not in strictness a transfer of the property in the thing sold ; that it amounted to letting the buyer have the thing, rather than giving it to him ; though it was a special rule, notwithstanding, that the buyer should suffer loss if the thing perished before delivery, the seller being bound on his part to take reasonable care meantime, but no further.³ While, then, mutual consent became,

¹ See Story Sales, § 231 ; Fletcher v. Peck, 6 Cr. 87.

² Story Sales, § 186.

³ See Benj. Sales, bk. 2, c. 7, where the effect of a sale by the civil law is treated at length ; Dig. 18, 1, 25, § 1 ; Inst. 3, 23, 3 ; Gaius, L. 4, § 30.

in Rome's maturity, the foundation of a contract of sale, the jurisprudence of the empire on this subject furnishes unsafe analogies for our guidance at the present day.

It may be gathered from the preceding chapter, at all events, that while the simultaneous union of three essentials is requisite for a valid sale at our law, there may yet be an incomplete bargain for that which is not yet ready to be regarded as in definite existence, nor with a definite price already put upon it, on the principle that an executory contract with consideration has been entered into, which will be given the effect of a complete sale and transfer in due time and under suitable circumstances. And here, so long as the contract continues merely executory, the subject-matter, if existing at all in an unfinished state, remains under the ownership of the selling party, who does not sell, but only promises to sell; while the buying party, as yet free from all responsibility for loss or destruction of the goods, can claim nothing specific under his contract, but is reduced to a suit for damages in case of its breach.

Since an executory agreement of sale is valid, and likewise an absolute bargain and sale, the question as to the true character of any such transaction, with the attendant consequences, will depend primarily upon the mutual intention of the parties. But if this mutual intention has not been manifested by their words, acts, and conduct with sufficient clearness, the case calls for the application of certain rules of construction, which may aid in determining the particular controversy. With this guiding principle, let us proceed to examine in this and succeeding chapters the effect of the contract of sale in transferring the property right to the subject-matter.

That transfer of property to which our attention should first be directed concerns contracts of sale of specific chattels. Specific chattels are those which are already in existence, ascertained, and appropriated to the contract, so that the sale was

plainly of those identical things and no others, whether any thing further was to be done to them or not. Thus, the sale of a certain horse, A., or of a certain yacht, is plainly the sale of a specific chattel ; and so, too, must it be in a variety of other instances, where the buyer has specially selected that which he desires because of its intrinsic qualities. And the sale of ten particular horses already selected is a sale of specific chattels, the contract relating to those ten identical horses and no others. So is the sale of a particular cargo in the mass, or of a particular herd of cattle, or of a particular heap of corn, or of a particular lot of cotton bales or of boxes of dry-goods, a sale of specific chattels, notwithstanding the cargo, or the herd, or the heap, or the lot, comprised within itself a great many particulars. But, on the other hand, the contract of sale which calls for any horse or yacht answering a certain description, or any chattel which may be supplied in response to a general order ; or that contract which calls for so many cattle out of a certain herd, so many bales or boxes from a certain lot, or so much in weight or measure from certain solids or liquids, — would be, at this stage in the transaction, the sale of chattels not specific. In this latter case there is nothing as yet definite, certain, identical, upon which the contract of sale may operate ; some further act of separation and setting apart, if not of positive selection, is requisite before there can be essentially a subject-matter under the contract. But in the former case the contract closes upon its own subject-matter precisely, and that to which the bargain related is specifically before the parties.¹

A contract may be for specific chattels, notwithstanding the identical goods are lying with other goods, and require to be separated. Thus, in the hypothetical case which Chief

¹ For instances of specific chattels sold, see *Cunningham v. Ashbrook*, 20 Mis. 553; *Russell v. Carrington*, 42 N. Y. 119; *Browning v. Hamilton*, 42 Ala. 484.

Justice Shaw suggested, if there are one hundred bales of cotton, numbered from one to one hundred, and the contract is for the fifty odd numbers, or the fifty even numbers, or any other specified fifty numbers, the bales sold are here identified though not separated, and the sale is one of specific chattels.¹ Any designation by a visible mark—branding, numbering, lettering, and so on—will render a contract which so identifies, a contract for specific property. And hence does a bill of sale represent specific goods where it describes barrels of mackerel as marked No. 1, No. 2, and No. 3, respectively, and includes all that the seller has on hand of any particular number, although these barrels are not separated from other barrels of mackerel; while, if the bill of sale does not include all that he has on hand of the particular number, and those intended to be covered by the contract are not yet specially set aside or designated, the transaction represented embraces goods as yet not specific.² So may there be a sale of a specific portion of goods in a warehouse, if that portion has its distinguishing marks, although there has as yet been no actual separation or delivery.³

Two leading considerations are suggested, as concerns chattels specific and chattels not specific: the one, that by the performance of certain acts chattels not specific may become specific chattels,—the latter class alone being what the contract always contemplates as the final condition of the thing sold; the other, that even specific chattels under a contract of sale may require something done to them before the transfer of property right can be pronounced completed. Of chattels not specific and the former consideration more hereafter. But as to contracts of sale which relate to specific chattels, let us, following the latter suggestion, consider them,

¹ Shaw, C. J., in *Arnold v. Delano*, 4 Cush. 40.

² *Ropes v. Lane*, 9 Allen, 502. And see *Beck v. Sheldon*, 48 N. Y. 365.

³ *Russell v. Carrington*, 42 N. Y. 118.

first, where nothing remains; and, *second*, where something remains, to be done to them.

First. Where specific chattels are embraced under a contract of immediate sale, and nothing remains to be done to them, the presumed intent of the parties is, that the right of property shall become transferred to the buyer and vest in him, immediately upon completion of the bargain by mutual assent. And even though the seller subsequently continue in possession of the goods, the presumption remains the same as between the parties; his possession being that of a bailee, with a right to recover his price.¹ For, as Chief Justice Bovill has said, "where specific and ascertained existing goods or chattels are the subject of a contract of immediate and present sale, and whether there be a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not at once vest in the purchaser."²

Most consequences of ownership necessarily attend this transfer of property; the buyer, under such a presumption, being liable in case the goods are subsequently destroyed without the seller's fault (supposing the seller still in possession as bailee), and, on the other hand, having rights of own-

¹ Benj. Sales, bk. 2, c. 2; Blackburn Sales, 147-149; cases *infra*.

² Heilbutt v. Hickson, L. R. 7 C. P. 438. In Simmons v. Swift, 5 B. & C. 862, Bayley, J., said: "Generally, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price." And Park, J., said, in Dixon v. Yates, 5 Ad. & El. 313: "I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery." And see Blackburn, J., in Calcutta Co. v. De Mattos, 32 L. J. Q. B. 322, 328; Olyphant v. Baker, 5 Denio, 379.

ership which pass to his own assignee or sub-vendee. For possession, a right of possession and a right of property need not coexist in one and the same person.

But, after all, the above rule is only one of presumption; and where it is evident, from the circumstances, that the intention of the parties requires something further before the right of property passes from the seller, no change of ownership as yet takes place. Particularly is this true where no price has been paid, and an ownership is yet claimed for the seller's benefit. Sales may doubtless be on credit; but mutual intention is evinced where the parties are silent, by business usage; and business usage varies in different localities, at different epochs, and with reference to different commodities. In the earlier days of the English law, when chattel traffic was in its primitive state, sales were usually for cash or "ready money," and the consideration of a contract of sale was most likely to be the actual payment of the price. Accordingly it was laid down by Noy, more than two centuries ago, that "in all agreements there must be *quid pro quo* presently; except a day be expressly given for the payment, or else it is nothing but communication;" by which we are to understand that a sale could not be considered executed or complete unless the money was paid at or about the time of the bargain, or else an agreement was entered into to pay on a day expressly named.¹ This strong presumption of a cash transaction, which suited well the simple modes of business then prevailing, has changed with later usage; and in England the present rule is more decidedly favorable to credit sales; and, as lately expressed, the consideration of the contract is now held to be the purchaser's obligation to pay the price, where nothing shows a contrary intent,—not the actual payment of a price.² As Judge Blackburn

¹ Noy's Maxims, 87-89 (A. D. 1641). And see Sheph. Touch. 224.

² Benj. Sales, bk. 2, c. 2; Blackb. Sales, 147-149; Simmons v. Swift, 5 B. & C. 862; Dixon v. Yates, 5 Ad. & El. 313.

expresses it, the parties (at least in commercial transactions) are taken to contemplate an immediate transfer of the property in the goods, and an immediate obligation to pay the price, with a reasonable time for delivery and payment, unless there be something to show a different intention.¹ Yet it is clearly admitted by him that where this presumption is rebutted, either from the nature of the transaction, or from other circumstances, so as to show that the sale was for ready money, the modern law does not differ from the ancient.² In this country — especially where the sale is not between commercial parties — the view frequently taken, conformably to the supposed intention of the parties, is, that the property to a specific chattel does not vest in the purchaser, where nothing was said concerning payment, and no arrangement for credit was made until the purchase-money is actually paid or adjusted ; but that immediately upon such payment or arrangement for time, and without waiting for delivery, the ownership is presumably shifted.³ And whatever may be the assumed course of dealing among merchants, and particularly in the wholesale trade, we should say that, as between a retailer and his casual customer, cash on delivery, with title in the seller until the price is paid or secured, is, by the American, and perhaps, too, the English rule, *prima facie* the mutual understanding ; credit sales resulting from a closer connection of the parties and a definite undertaking on the seller's part to run unusual hazards to accommodate the buyer.⁴

The presumption will readily shift, too, from regard to the matter of delivery. Undelivered goods may be purchased

¹ Blackb. Sales, 147-149.

² *Ib.*

³ *Hanson v. Meyer*, 6 East, 614; *Darnell v. Griffin*, 46 Ala. 520; *Cassell v. Backrack*, 42 Miss. 56; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Wabash Elevator Co. v. First National Bank*, 23 Ohio St. 311; *Michigan Central R. R. Co. v. Phillips*, 60 Ill. 190; *Russell v. Carrington*, 42 N. Y. 118; *Brehen v. O'Donnell*, 34 N. J. L. 408; *Little v. Page*, 44 Mis. 412. But see *Jenkins v. Jarrett*, 70 N. C. 255.

⁴ See *post*, c. 5, as to sales conditional on payment.

with the understanding either that the seller deliver them, or that the buyer send for them. While the disposition of the courts is doubtless to give the buyer who has paid for the goods all the advantages of a presumed ownership, they are not so ready to throw upon him the burdens of a loss while an act of delivery incumbent upon the seller remains actually unperformed.¹ Even as a bailee of the goods whose ownership is transferred, the seller has some responsibility for their safety; as a common carrier, could he be so regarded, his liability for their safe delivery would be even greater; and there are cases which go so far as to make him absolutely bound under a contract of sale to deliver the goods at the place agreed upon, — thus putting upon the seller instead of the buyer the loss of goods paid for and not yet delivered, though the loss were occasioned by inevitable accident, without the fault of either; this on the ground of an undertaking by the seller amounting to a condition precedent.²

But, with the foregoing qualifications, the modern presumption, in the sale of specific chattels, must be that the property or right of ownership in those chattels vests at once in the buyer and a right to the price in the seller, as soon as the bargain is struck by the *aggregatio mentium*, although nothing has been said about payment or delivery; provided, of course, nothing further is contracted to be done to the goods; the presumption being subject to countervailing evidence of mutual intent. This is established by numerous English and American authorities.³

¹ See *Dyer v. Libby*, 61 Me. 45; *Gilmour v. Supple*, 11 Moore P. C. 551; *Pier v. Duff*, 63 Penn. St. 59; *Whitcomb v. Whitney*, 24 Mich. 486. The judicial inclination is here to leave the question to the jury as one of fact.

² See *Bigler v. Hall*, 54 N. Y. 167, *Reynolds, C.*, dis. This extreme case seems opposed to *Terry v. Wheeler*, 25 N. Y. 520, *Dexter v. Norton*, 47 N. Y. 62, and *Howell v. Coupland*, L. R. 9 Q. B. 462. But see *Logan v. Le Mesurier*, 6 Moore P. C. 116. See *post*, c. 5.

³ *Tarling v. Baxter*, 6 B. & C. 360; *Dixon v. Yates*, 5 Ad. & El. 313;

Second. Where specific chattels are bargained for under a contract of immediate sale, and something remains to be done to them by mutual understanding of the parties, the presumption is against a transfer of ownership until performance of the thing has taken place; though the question is still one of mutual intention, and open to rebutting proof as before. For while the thing to be done might, upon a true construction of the bargain, be shown to stand as an independent stipulation, not coming within the purview of the contract of sale at all, nor affecting the essential relation of buyer and seller, yet if the force of that stipulation be in doubt, or in case of its clearly inseparable connection with the contract of sale, the court construes that stipulation into a condition precedent, causing a suspension of the transfer of title, — a consequence which must needs attend the incorporation of any condition precedent with a contract of sale, so long as that condition continues unfulfilled.¹

Lord Ellenborough and his successors have introduced into the English law certain rules of convenience on this subject, somewhat artificial. Borrowed from the civilians in the first place, they are applied by the courts of this day with a degree of flexibility which impairs their practical usefulness. Judge Blackburn thus states them: (1st.) Where by the agreement the vendor is to do any thing to the goods, for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in

Simmons v. Swift, 5 B. & C. 862; *Gilmour v. Supple*, 11 Moore P. C. 551; *Olyphant v. Baker*, 5 Denio, 379; *Dexter v. Norton*, 55 Barb. 272; *Whitcomb v. Whitney*, 24 Mich. 486; *Bond v. Greenwald*, 4 Heisk. 453; *Webber v. Davis*, 44 Me. 147; *Buffington v. Ulen*, 7 Bush, 231; *Bailey v. Smith*, 43 N. H. 141; *Benj. Sales*, bk. 2, c. 2; *Blackb. Sales*, 147-149; *Heilbutt v. Hickson*, L. R. 7 C. P. 449; *Morse v. Sherman*, 106 Mass. 430; *Leonard v. Davis*, 1 Black (U.S.), 476.

¹ See *infra*, c. 5.

the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property. (2d.) Where any thing remains to be done to the goods, for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, when the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.¹ These two rules have been in substance adopted and applied in numerous English and American decisions from the close of the last century, but not with uniformity, as will be presently shown. The rules, as thus stated, are not correlative; for the first applies to acts of the seller, while the second comprehends acts of seller, buyer, and third parties; moreover, as both relate to putting goods into a deliverable state, the second might be viewed as in some respects deducible from the first, unless both indeed were regarded as exhibiting phases of a principle more expansive. Judge Blackburn, though believing the former of these rules to be founded in reason, — since it is generally for the seller's advantage that the property should pass if he retains the goods as security for the price, — thought that the latter was somewhat hastily adopted from the civilians, without advert- ing to some important distinction between their law and ours.²

Let us briefly advert to the leading English cases under the head of acts to be done by the seller. In *Hanson v. Meyer*, where the purchaser became bankrupt before the goods were fully weighed and delivered, Lord Ellenborough said that the act of weighing (which was here under the seller's own

¹ Blackb. Sales, 151, 152; Benj. Sales, bk. 2, c. 3.

² Blackb. Sales, 151-154. And see 2 Kent Com. 496; Story Sales, §§ 246-253; Pothier Contrat de Vente, No. 308; Civil Code La., art. 2433.

orders) was in the nature of a condition precedent to the passing of the property by the terms of the contract, because "the price is made to depend upon the weight."¹ But this view of the act of weighing was drawn from a peculiar state of facts, — no payment of the agreed price having been made in a sale for cash, and it would have been a great hardship to the seller to view the transfer as completed, under the circumstances. The obligation of the buyer to pay the price before the title should vest in him may have furnished the true condition precedent. In *Rugg v. Minett*, certain casks having been destroyed which were not yet filled up by the seller according to contract, it was held that in these the property had not passed.² *Zagury v. Furnell* showed a sale of bales of goatskins. By the custom of the trade, the seller was first to count over the goatskins sold; and as these had not been counted before a fire, the loss was placed upon the seller.³ *Simmons v. Swift* was the case of loss occasioned by damage to a lot of bark. Here the subject-matter of sale was clearly ascertained; it was all the bark stacked at a certain place, to be paid for at so much a ton; but the price could not be ascertained until the bark had been weighed. The weighing was not to be done, it appears, by the seller alone, for the agreement of the parties contemplated a mutual weighing on behalf of both; but, at least, "the concurrence of the seller in the act of weighing was necessary." The court placed the loss upon the seller.⁴ In *Acraman v. Morrice*,

¹ *Hanson v. Meyer*, 6 East, 614. It was here broadly stated: "If any thing remain to be done on the part of the seller as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer." And see *Withers v. Lyss*, 4 Camp. 237.

² *Rugg v. Minett*, 11 East, 210. ³ *Zagury v. Furnell*, 2 Camp. 240.

⁴ *Simmons v. Swift*, 5 B. & C. 857. The decision of this case went mainly upon another ground, the want of delivery under the contract sued upon; and the judges were not unanimous in the opinion that no transfer of property had taken place.

the seller was allowed to have retained property as against a bankrupt buyer, where the contract of sale contemplated a selection of timber on the part of the buyer, whereupon the seller was to sever and dress the timber, and then convey it.¹ *Logan v. Le Mesurier* is an unusual case, where rafted timber not already delivered by the seller was destroyed by a storm, the buyer having already made payment. Here, the circumstances being taken together, and the whole contract viewed in the light of mutual intention, the result arrived at was that property was not to pass until the timber had been measured at the place of delivery.² *Tansley v. Turner and Cooper v. Bill*, are to the effect that, where the seller's acts under the contract are fully performed, the title passes to the buyer; a mere footing up of the agreed measurement which was to be sent not entering into the contract of sale.³

The American authorities appear to have been in substantial accord with the English at the outset. Chancellor Kent set it forth as a well-established principle in our doctrine of sales half a century ago, that "if any thing remains to be done, as between the seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer;" adding, however, that when every thing is done by the seller to put specific goods in a deliverable state, the property, and consequently the risk thereof, passes to the buyer.⁴ He further stated it to be a fundamental principle, pervading everywhere the doctrine of sales of chattels, "that if the goods of different value be sold in bulk, and not separately, and for a single price, or *per aversionem*, in the lan-

¹ *Acraman v. Morrice*, 8 C. B. 449.

² *Logan v. Le Mesurier*, 6 Moore P. C. 116. That the prepayment of price by the buyer had much to do with this decision, see the opposite result reached in *Gilmour v. Supple*, 11 Moore P. C. 551.

³ *Tansley v. Turner*, 2 Scott, 238; *Cooper v. Bill*, 3 H. & C. 722. See also *Langton v. Higgins*, 4 H. & N. 402.

⁴ 2 Kent Com. 495; *M'Donald v. Hewett*, 15 Johns. 349; *Barrett v. Goddard*, 3 Mas. 107; *Allman v. Davis*, 2 Ire. (N. C.) 12.

guage of the civilians, the sale is perfect and the risk with the buyer ; but if they be sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller until the specific property be separated and identified.”¹ Judge Story and other eminent American jurists besides our commentator gave in their early adhesion to Lord Ellenborough’s rules.² And the same maxims are constantly repeated in the courts, as occasion arises for applying them.³ But with the rapid growth of the law of sales in this country, and the constantly varying aspects of facts as presented to a jury, there has developed in many quarters a positive preference for letting each case go pretty much upon its intrinsic merits, weighing the proof submitted, and letting the decision turn upon mutual intention, with no very strong presumption one way or another.⁴ Nor are the English rules stated and applied without some variation. Thus, it is sometimes said that the reason why marking, measuring, &c., is a prerequisite of transfer, is merely that the particular goods may be identified ; in other words, made specific property, — a subsequent weighing or measuring merely to determine the full price at such a rate constituting no obstacle to the passing of property.⁵ And certainly the presumption has been readily overcome, in certain cases, on the ground of a mutual intent to the contrary, express or implied, where the goods, though not yet weighed

¹ 2 Kent Com. 496; *Devane v. Fennell*, 2 Ire. 36.

² See *Barrett v. Goddard*, 3 Mas. 197; *Higgins v. Chessman*, 9 Pick. 7; *Ward v. Shaw*, 7 Wend. 404; *Davis v. Hill*, 3 N. H. 382.

³ *Straus v. Ross*, 25 Ind. 300; *Mason v. Thompson*, 18 Pick. 305; *Story Sales*, § 220; *McClung v. Kelley*, 21 Iowa, 508; *Bailey v. Smith*, 43 N. H. 141; *Lingham v. Eggleston*, 27 Mich. 324.

⁴ See *Hyde v. Lathrop*, 3 Keyes, 497; *Hutchinson v. Hunter*, 7 Barr, 140; *Groat v. Gile*, 51 N. Y. 431; *Graff v. Fitch*, 58 Ill. 573; *Morrow v. Reed*, 30 Wis. 81; *Southwestern Freight Co. v. Stanard*, 44 Mis. 71; *Marble v. Moore*, 102 Mass. 443.

⁵ *Crofoot v. Bennett*, 2 Comst. 258; *Riddle v. Varnum*, 20 Pick. 280; *Arnold v. Delano*, 4 Cush. 40; *Southwestern Freight Co. v. Stanard*, 44 Mis. 71; *Adams Mining Co. v. Senter*, 26 Mich. 73.

or measured, were otherwise ready for delivery; especially if payment of the price had already been made or arranged between the parties.¹ But other cases are decided on the principle that weighing and measuring, with the seller's concurrence, postpones presumably the change of ownership;² as where, for instance, wood was sold at so much per cord, a subsequent measurement being part of the bargain; and while the parties were disputing as between "running measure" or "solid cords," the wood floated away and was lost.³ Other acts than those of weighing and measuring, which are made requisite on the part of the seller to put the goods in a deliverable state in compliance with the mutual contract, have been generally held to postpone the divesting of his property. For instance, baling and pressing a lot of hops;⁴ taking out samples and comparing them with original samples in a sale of cotton;⁵ the scaling of logs;⁶ marking stems, and otherwise preparing tobacco.⁷ But, on the whole, the American decisions, as well as the grounds upon which they are rested, are quite contradictory; though more especially with reference to the second than the first of the Blackburn propositions, to the rule of weighing and measuring, rather than that of the seller's performing general acts to put the subject-matter into a deliverable state. Upon the unfulfilled condition precedent of paying the price before a title shall vest in

¹ See *Riddle v. Varnum*, 20 Pick. 280; *Groat v. Gile*, 51 N. Y. 431; *Fitch v. Burk*, 38 Vt. 683; *Boswell v. Green*, 1 Dutch. 390; *Cummins v. Griggs*, 2 Duv. 87; *Brown v. Child*, 2 Duv. 314.

² *Frost v. Woodruff*, 54 Ill. 155; *Wittkowsky v. Wasson*, 71 N. C. 451; *Gibbs v. Benjamin*, 45 Vt. 124; *Fuller v. Bean*, 34 N. H. 290; *Lingham v. Eggleston*, 27 Mich. 324; *Jones v. Pearce*, 25 Ark. 545.

³ *Gibbs v. Benjamin*, *supra*. And see *Nesbit v. Burry*, 25 Penn. St. 208.

⁴ *Keeler v. Vandervere*, 5 Lans. 313.

⁵ *Kein v. Tupper*, 52 N. Y. 550.

⁶ *Begole v. McKenzie*, 26 Mich. 470. But see *Morrow v. Reed*, 30 Wis. 81.

⁷ *Dixon v. Myers*, 7 Gratt. 240.

the buyer, rather than the want of weighing, measuring, or putting the goods into a deliverable state, many of our cases turn.¹ And that any presumption of a suspended transfer may be overcome by proof of mutual intention that the property should pass before the thing was put into a deliverable condition, is left clear and unquestionable.²

Pothier is quoted by Mr. Story as of the opinion that if a sale be made of all the corn stored in a particular granary at so much a hundred-weight, the sale is not considered perfect before the weighing or measuring is performed.³ But upon this passage Mr. Story observes, that the distinction must be kept in view between a sale by measure or weight, requiring the weighing or measuring to be accomplished for ascertaining the price, and the sale of specific goods in a lump at an ascertained price, accompanied by a representation or warranty of the weight or quantity, — where, so to speak, the weighing is only to satisfy the purchaser that he has got the quantity bargained for.⁴ That as between purchasing a lot of specific goods at a fixed rate, with the intent of having them subsequently weighed and measured to ascertain the total sum payable, and the sale by measure or weight of what are, as yet, goods unspecified, not on hand, or else to be separated from a larger mass, there is a decided difference in the presumptions of transfer, will appear in the next chapter. But here, in the case of specific goods sold by the lot, we may distinguish two separate transactions. One is the sale of a certain specific lot at an agreed weight, measurement, &c., and on fixed terms, whereby the estimated weight is final between the parties, notwithstanding the buyer, on further test, might find the goods excessive or short; and

¹ See *post*, c. 5, as to this doctrine.

² See *Riddle v. Varnum*, 20 Pick. 280 ; *Boswell v. Green*, 1 Dutch. 390 ; *Bemis v. Morrill*, 38 Vt. 130 ; *Cushman v. Holyoke*, 34 Me. 289.

³ Pothier *Contrat de Vente*, No. 309.

⁴ Story *Sales*, § 220.

here, the price being made by the terms of the bargain not only exact in rate, but, upon the simplest arithmetical computation, exact in amount, the transfer is completely made to the buyer on the bargain itself, quite independently of all further superfluous acts of weighing, measuring, or testing.¹ The other transaction is the sale of a specific lot at a fixed rate, the total price to be according to what it may prove to weigh or measure ; in which case, the rate being exact by the terms of the bargain, and the obligation to pay extending to the identical goods, neither more nor less, there yet remains, in accordance with mutual agreement, a further test to be applied, before the exact amount payable can be determined. It is this latter case of specific goods that really presents difficulty as to title transfer ; though even here the courts seem disinclined to apply the rule which suspends a transfer, pending the weighing or measuring which shall be decisive of amount payable, and rather favor the shifting of ownership, with its attendant advantages and risks, to the buyer, without awaiting the application of the final test.² Where delivery of such goods has once been made by the seller, or the goods were at the special risk of the buyer, and the property is then destroyed, so as to render weighing or measuring actually impossible, the full amount due is to be ascertained, as near as may be, by other evidence, and the seller recovers his price accordingly.³

¹ *Welch v. Moffat*, 1 N. Y. Supr. (Thomp. & C.) 575.

² *Swanwick v. Sothern*, 9 Ad. & El. 895; *Groat v. Gile*, 51 N. Y. 431; *Riddle v. Varnum*, 20 Pick. 280; *Cunningham v. Ashbrook*, 20 Mis. 553; *Adams Mining Co. v. Senter*, 26 Mich. 73. In this latter case it was observed by the court: "The whole property being identified and sold at a fixed price per foot, the process of ascertaining the amount was not essential to passing the title, as it might have been if less than the whole amount delivered was to be sold and separated by measurement." In *Cunningham v. Ashbrook* the property had been delivered to the buyer, though not yet weighed.

³ *Cunningham v. Ashbrook*, 20 Mis. 553; *Castle v. Playford*, L. R. 7 Ex. 98; *Martineau v. Kitching*, L. R. 7 Q. B. 436.

Now as to acts to be performed by the buyer with reference to a contract for the sale of specific goods. In *Rugg v. Minett*, the seller had done all that was incumbent upon him, upon a sale contract concerning a large lot of turpentine in casks, including the filling up of the casks; but it was necessary to have the casks gauged by a customs officer before they were removed. By Lord Ellenborough, with whom Le Blanc, J., and Bayley, J., agreed, it was ruled, that as the gauging remained to be done at the buyer's instance, and not the seller's, the property had already passed so as to render the buyer liable for a loss occurring before delivery.¹ In *Swanwick v. Sothern*, Lord Denman, C. J., admitting the principle to be well established that where acts on the part of the seller are necessary, including weighing or measuring to identify the goods or to ascertain the price, the property does not pass, declares it otherwise where, instead, the weighing can only be for the buyer's own satisfaction.² In *Gilmour v. Supple*, where a raft of timber had been sold at a certain rate per foot, and the measurement was already made, so far as compliance with the mutual contract went, the intent to make a subsequent measurement for the buyer's own satisfaction only was held not to have suspended the legal transfer of property to the buyer; and for a subsequent loss by storm, — delivery appearing to have been actually made to the buyer's servant, — the buyer was accordingly held the responsible party.³ Channell, B., of the Exchequer, in *Turley v. Bates*, later intimated that the rule promulgated by Judge Blackburn,⁴ as to weighing, measuring, &c., should apply in general to acts by the seller, and not extend to a case where all that remained to be done was to be done by the buyer, with full authority from the seller to do the act. But, with

¹ *Rugg v. Minett*, 11 East, 210.

² *Swanwick v. Sothern*, 9 Ad. & El. 895.

³ *Gilmour v. Supple*, 11 Moore P. C. 551.

⁴ See *supra*, p. 232.

an obvious reluctance to disturb authorities, he placed his decision on the sure ground that here the parties had made their intention sufficiently clear that the property should pass, notwithstanding a contemplated after-weighing, and this intention should be decisive of the right. Here the buyer was, at his own expense, to load and cart away a heap of fire-clay which he had purchased in the mass, and have it weighed at a certain machine convenient to him.¹ The reasoning of this decision finds approval in the latest cases; and in the opinion of some of the best English judges of the present day, the property in the goods passes whenever the acts remaining to be done are at the buyer's own instance, and not the seller's; their obvious tendency being to regard mutual intention at all events.²

In the American cases the buyer's acts are sometimes considered. One circumstance in *Riddle v. Varnum*, which upheld the buyer's title, was, that measurement was to be made by a third person under the buyer's direction, the seller agreeing to be bound by such measurement.³ It would appear to be the American rule, that acts such as weighing and measuring, to be performed purely for the buyer's own convenience and satisfaction, do not prevent the divestment of the seller's right of property.⁴

Delivery is doubtless an important circumstance bearing upon this question of mutual intention. How far should it be decisive in shifting the burden of proof from seller to buyer? For it is no uncommon thing for property to be delivered upon the understanding that the price shall be

¹ *Turley v. Bates*, 2 H. & C. 200 (1863). And see *Kershaw v. Ogden*, 3 H. & C. 717.

² *Cockburn, C. J., and Blackburn, J., in Castle v. Playford*, L. R. 5 Ex. 165; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *North British Ins. Co. v. Moffatt*, L. R. 7 C. P. 25.

³ *Riddle v. Varnum*, 20 Pick. 280.

⁴ See *Prescott v. Locke*, 51 N. H. 94; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Gibbs v. Benjamin*, 45 Vt. 124.

ascertained by subsequent weight or measurement, — perhaps at a different place from that of delivery. It is reasonable to presume, wherever the goods are actually delivered, that the parties intended this as the final act of transfer (save so far as the question of payment as a condition precedent may arise),¹ and that any subsequent acts of weighing or measuring must have had reference to the buyer's convenience, or an adjustment of the total price which was by mutual agreement deferred to the vesting of property in the buyer.² That the property in the goods may pass, even though something remains to be done to them by the seller after their delivery, is distinctly held ; this perhaps, however, upon proof, and not presumption.³ But the presumption of a completed transfer of property must be strong where miscellaneous acts subsequent to delivery are to be performed solely by the buyer, or on his behalf, and not on the seller's.

By accepting the specific chattel as his own in fact, under a delivery, the buyer might well be supposed to have waived all claim to a delayed transfer of property arising out of further acts which remained to be performed.⁴ And a like reasoning might apply for shifting the presumptions, in case the risks of delivery had been specially assumed by the buyer. But whether it be conceived that property has passed or not, in the latter instance, it is clearly decided that the buyer is liable for destruction of the goods caused through no fault of the seller, and is bound to the payment of the agreed price, wherever he has specially contracted to bear the risk of delivery ; for this would be but enforcing a fulfilment of his own

¹ See c. 5, *infra*.

² *Riddle v. Varnum*, 20 Pick. 280; *Burr v. Williams*, 23 Ark. 244; *Kelsea v. Haines*, 41 N. H. 247, 254; *Cushman v. Holyoke*, 34 Me. 289; *Odell v. Boston & Maine R. R.*, 109 Mass. 50; *Cunningham v. Ashbrook*, 20 Mis. 553.

³ *Greaves v. Hepke*, 2 B. & Ald. 131; *Hammond v. Anderson*, 1 B. & P. N. R. 69.

⁴ See *Burr v. Williams*, 23 Ark. 244.

express undertaking.¹ As regards delivery generally, it should be added, that it is sometimes the duty of the seller, under a contract of sale, to deliver, and sometimes of the buyer to come and take, the goods; so that in one transaction the seller might have to put his property into a deliverable state, and then deliver; while in another, he needs only to have the specific goods in condition for delivery, and then give the buyer notice to come and take them.² A special undertaking, on the seller's part, to convey the purchased goods to a certain point for the buyer's convenience, is not inconsistent with the previous transfer of ownership by mutual assent.³

Upon the whole, it seems impossible to reconcile the English and American decisions concerning the sale of specific chattels, where something remains to be done to them, upon any principle short of giving their mutual intention easy play. And it is evident that a rule no more stringent than this must expose contracting parties constantly to the caprice of court and jury. But, in any event, it would seem that the two rules of presumption which Judge Blackburn has set forth need to be restated, in order to be properly applied. Perhaps they may best be stated, with the reasons, as follows: Previous to the delivery of specific chattels already bargained for, it is for the seller's interest, rather than the buyer's, — since the former still retains a hold sufficient to secure his price, — that the property therein should be deemed to have passed out of the former, and vested in the latter; but, after their delivery, it is likely to be otherwise. *First*, then, when the contract of sale applies to specific chattels,

¹ *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Castle v. Playford*, L. R. 5 Ex. 165; 7 Ex. 98.

² Cf. *Waldron v. Chase*, 37 Me. 414, *Whitcomb v. Whitney*, 24 Mich. 486, *Bond v. Greenwald*, 4 Heisk. 453, *Martineau v. Kitching*, *supra*, with *Logan v. Le Mesurier*, 6 Moore P. C. 116.

³ See *Dyer v. Libby*, 61 Me. 45.

not yet actually delivered, and by mutual agreement, something remains to be done to those chattels, by the seller alone or by some other person, as an act demanding at least the seller's concurrence under the contract, for his own benefit, — this being for the purpose of putting the property into that deliverable state in which the purchaser shall be bound to accept, — the presumption is, in absence of circumstances indicating a contrary mutual intention, that, until performance thereof, the right of ownership shall not pass from the seller to the buyer. *Second*, but where, under such a contract for the sale of undelivered specific chattels, the thing remaining to be done is to be done by the buyer, or by some other person, independently of such concurrence on the seller's part, and as something for the buyer's sole benefit or convenience, the right of property in the chattels will be presumed to have passed to the buyer, as in the case of specific chattels sold where nothing remained to be done. *Third*, where the seller has made actual delivery of the specific chattels, and the buyer has accepted them, the presumption is, — so far, at least, as risks of title are concerned, — that the right of property has shifted from seller to buyer, whether more remains to be done to the chattels or not. The second rule given by Judge Blackburn as to weighing, measuring, and testing the chattels, may, for present purposes, be considered as merged in the above propositions.¹

¹ We should remember that this property right (or property), though often interchanged, in the law of sales, with the word "title," is in strictness only one of the three elements which constitute a perfect title. (See *supra*, p. 3.) Nor is the transfer of ownership to be pronounced full and complete, so long as the buyer has only the right of property, without possession and the right of possession besides.

CHAPTER III.

TRANSFER OF PROPERTY RIGHT IN CHATTELS NOT SPECIFIC.

UNDER a contract of sale relating to chattels not specific, that which is generally indispensable, before an actual transfer of property from seller to buyer can take place, is to make the subject-matter specific; in other words, to appropriate identical chattels to the contract. Until this is done, the presumption remains that the agreement, still executory, contemplates a postponement of transfer meanwhile; and it is evident that trover or replevin cannot be maintained for goods which are not as yet identified, but exist only as part of a mass awaiting separation.¹

Any agreement to furnish goods which require a specific identification, selection, and separation, to meet the contract, must be executory in its character, as concerns a transfer of the property; for the minds of the parties do not yet meet on any thing specific: and the same principle applies where an article is contracted to be made to order. Even were the goods so far ascertained that the minds of the parties had already met upon a specified larger mass, from which the particular goods bargained for were to be taken, the law cannot fasten upon any particular portion of that mass, and say that this was the distinctive thing embraced under their mutual assent.²

To this effect, as to unspecified goods, are numerous English and American decisions. Thus, in *Austen v. Craven*,

¹ *Austen v. Craven*, 4 Taunt. 644; *Scudder v. Worster*, 11 Cush. 573; *Gillett v. Hill*, 2 C. & M. 530.

² *Benj. Sales*, bk. 2, c. 4; *Blackb. Sales*, 122, 128.

a case before Lord Mansfield, there had been a contract made for a certain quantity of a specified quality of sugars, and any sugars of the required quality would have satisfied it. It was held that no property had passed to the buyer.¹

White v. Wilks applied a like rule in the case of oil, — a more volatile substance, and hence even less likely, as measured out, to have been the identical subject-matter embraced by the terms of the original bargain.² So would it be with a sale of ten tons of Riga flax, requiring the separation, by weight, from a larger mass of eighteen tons, and perhaps, according to the custom of packing, the breaking-up, besides, of bundles known as mats;³ and where a bargain is for a certain number of barrels of pork, not identified or distinguished from the larger quantity which the seller has on hand;⁴ or for so many bushels out of a larger mass kept in store;⁵ or for two thousand telegraph-poles, which must be selected from a lot containing some twenty-one hundred;⁶ or for ores, to be hereafter delivered from a mine.⁷ In all such cases as these, the identity of the chattels contracted for, not being as yet ascertainable from the contract, but requiring further specific acts, the property does not pass to the buyer, but remains in the seller until identification, by suitable acts of selecting and separating, has taken place.

But the cases are not all in clear accordance with this doc-

¹ *Austen v. Craven*, 4 Taunt. 644. But see *Whitehouse v. Frost*, 12 East, 614.

² *White v. Wilks*, 5 Taunt. 176. And see *Foot v. Marsh*, 51 N. Y. 288; *Wallace v. Breeds*, 13 East, 422; *Haldeman v. Duncan*, 51 Penn. St. 66.

³ *Busk v. Davis*, 2 M. & S. 397; *Shepley v. Davis*, 4 Taunt. 617.

⁴ *Scudder v. Worster*, 11 Cush. 573.

⁵ *Waldo v. Belcher*, 11 Ire. 609.

⁶ *Bailey v. Smith*, 43 N. H. 141.

⁷ *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184. And see *Hutchinson v. Hunter*, 7 Barr, 140; *Browning v. Hamilton*, 42 Ala. 484; *Golder v. Ogden*, 15 Penn. St. 528; *Ormsbee v. Machir*, 22 Ohio St. 295; *Warren v. Buckminster*, 24 N. H. 336.

trine as a rule of absolute force. Leaving out the question of practical remedies, such as trover and replevin, and regarding only the rights of parties, and liability for loss, there seems to be good authority for asserting, that, if the parties so intend it, and their mutual intention is made sufficiently manifest, the usual presumption against a change of property, even in goods not specific, may be overcome; though whether it be on the ground that property has passed, or that the buyer has specially contracted to assume the risks, is not always clear.¹ Again: there are cases which favor legal discrimination between goods which require both selection and separation, and those requiring separation only; as, for instance, between sales such as that of ten gallons of a certain kind of oil which the seller has on hand, or of ten pounds from a certain lot of sugar, and the sale of ten good saddle-horses out of a herd, or of ten barrels of the A. mill flour out of a lot which contains shipments from various parties.² For it is seen, that, in this latter class of cases, an act of special discrimination is requisite; and hence the property should less readily be presumed to have passed than in the former class. By applying the rule of mutual intention with more or less force to overcome a contrary presumption, according as the sale may require separation alone, or separation accompanied by selection, the conflicting decisions under this head may be somewhat reconciled. And, upon this view of mutual intention, the circumstance that the purchaser is invested with the right and duty to take the goods, separating for himself, is not without its force in determining whose should be the risks.³

¹ *Watts v. Hendry*, 13 Fla. 523; *Chapman v. Shepard*, 39 Conn. 413; *Waldron v. Chase*, 37 Me. 414.

² Cf. *Haldeman v. Duncan*, 51 Penn. St. 66, and *Chapman v. Shepard*, 39 Conn. 413.

³ See *Foot v. Marsh*, 51 N. Y. 288, explaining *Kimberly v. Patchin*, 19 N. Y. 330; *Waldron v. Chase*, 37 Me. 414; *Weld v. Cutler*, 2 Gray, 195. But see *Haldeman v. Duncan*, 51 Penn. St. 66, where the buyer had

It should be further observed that still other decisions, apparently in conflict with the general rule, are explainable on the assumption that the contract was not for a sale of property to be accompanied by identification and separation at all, but simply for the purchase of an undivided fractional part of the mass ; the effect here being to join both parties in title, instead of transferring from the one to the other the ownership of a specific portion.¹ And, once more, waiving the question of transfer, the issue, as sometimes presented, is, whether or not the buyer or seller is not precluded, by his own acts and conduct, from alleging that the property right has or has not passed to the other party's disadvantage.²

Where an article is to be made to order, the same general doctrine holds true : for, on the mere agreement to supply, no specific thing can be identified as the property actually bargained for ; but any thing answering to the description might be afterwards furnished and appropriated to the contract. Thus, a carriage-maker, ordered to build a carriage after a certain pattern, might throw aside any number of carriages begun upon, because dissatisfied with them, or might turn them over to meet his more pressing orders from other quarters, before transferring his labors to that which finally turns out the specific property of a particular contract of sale.

paid for the oil, and was requested to select and take his goods, but did not do so ; and the goods were destroyed. Here, however, both selection and separation were necessary.

¹ See *supra*, pp. 42, 43 ; *Cushing v. Breed*, 14 Allen, 376 ; *Kimberly v. Patchin*, 19 N. Y. 330 ; *Whitehouse v. Frost*, 12 East, 614. *Whitehouse v. Frost* was much questioned in *White v. Wilks*, 5 Taunt. 176, and other English cases ; but is defended on this ground in *Busk v. Davis*, 2 M. & S. 397.

² *Woodley v. Coventry*, 2 H. & C. 164 ; *Knights v. Wiffen*, L. R. 5 Q. B. 660. But see *Scudder v. Worster*, 11 Cush. 573, as to whether the doctrine of estoppel can be invoked in a case of replevin. See *Pleasants v. Pendleton*, 6 Rand. 473, which appears to have been wrongly decided on principle, from regard to the exceptionally hard circumstances of the case.

Hence a contract of sale for a chattel not, at the time, in existence, but to be made and furnished by the seller, is executory only; and, as a rule, no property in the chattel vests in the buyer until it is completely finished, and, in some manner, set aside and appropriated to the contract.¹ But this rule is still one of presumption only; and the intent of the parties, as manifested by the particular circumstances, must control in the interpretation of their contract. Thus, a sale might be made of an unfinished chattel, as such, or of a chattel progressing towards completion; the true question being whether the parties to the sale, by mutual acts and conduct, had already concluded a transfer of the property to the thing in its existing state, or, at least, of the risks which usually attend ownership.²

That which is found essential, then, in sale contracts relating to chattels not specific, in order to change presumptions of intent, and convert what was before a mere executory agreement into a bargain and sale, so full as to carry over an ownership therein, becomes, under the present head, simply a specifying of the goods, — acts which identify certain chattels, and set them apart as fulfilling the sale stipulations between the parties. This, in law, is termed a *subsequent appropriation* of specific chattels to the contract. When such appropriation has fairly taken place, the contract stands related to specific chattels, and the legal rules which were stated in the last chapter become at once applicable to the property.

Appropriation may take place in various ways. The

¹ Story Sales, §§ 232, 315; Benj. Sales, bk. 2, c. 4; Blackb. Sales, 122, 128; Mucklow v. Mangles, 1 Taunt. 318; Atkinson v. Bell, 8 B. & C. 277; Briggs v. Light Boat, 7 Allen, 287; Fairfield Bridge Co. v. Nye, 60 Me. 372; Halterline v. Rice, 62 Barb. 593; McIntyre v. Kline, 30 Miss. 361; First Nat. Bank v. Crowley, 24 Mich. 492; Gammage v. Alexander, 14 Tex. 414; Rider v. Kelley, 32 Vt. 268.

² Ib.; Woods v. Russell, 5 B. & Ald. 942; Young v. Matthews, L. R. 2 C. P. 127; M'Conihe v. N. Y. & Erie R. R. Co., 20 N. Y. 495; Brown v. Bateman, L. R. 2 C. P. 272.

authority to appropriate may rest in the buyer alone, or in the seller alone; or there may be an appropriation by one party, to which the other must afterwards assent. To whichever of these kinds of appropriation a particular contract relates, is a matter of interpretation.¹ Separation and setting apart, accompanied perhaps by a special selection, are the prime acts which constitute a legal appropriation so as to accomplish any presumed transfer of ownership. But there is much practical difficulty found in discriminating between incomplete and complete transfer in this respect; not only, as it seems, because of the legal uncertainty which prevails in determining whether unspecified goods have been rendered specific by appropriation or not, but, further, from this circumstance, that a seller will often really appropriate the specific goods to the contract, if it be incumbent on him to do so, and yet, being also bound to deliver, will, by such acts as making the bills of lading or invoices of the goods in his own name, evince a disposition to retain title, or what we shall presently consider as the *jus disponendi*, until he secures payment for the goods; besides which there may be further acts requisite on his part to put the property into a deliverable state. The judicial extension of the word "appropriation," illogically, as it would appear, through delivery, through this last stage of transit of the goods, and even up to a final acceptance on the buyer's part, has made the law of specifying chattels under a contract more complex, redundant, and indefinite than it naturally ought to be; the real difficulty, however, being presented in cases where the seller, and not the purchaser, is bound to make the appropriation.

Supposing, then, that the requisite acts of subsequent appropriation are to be performed by the seller. It is said by Mr. Benjamin, that in these cases alone,—namely, where the

¹ See Parke, B., in *Waite v. Baker*, 2 Ex. 1; Erle, J., in *Aldridge v. Johnson*, 7 E. & B. 885.

seller is, by the express or implied terms of the contract, entitled to make the selection, — the ablest judges have been much perplexed; and he instances this common mode of doing business: for one merchant to give an order to another to send him a certain quantity of merchandise, as so many hogsheads of sugar, where it becomes the seller's duty to appropriate the goods to the contract. The difficulty, he adds, is to determine what constitutes the appropriation; to find out at what precise point the seller is no longer at liberty to change his intention.¹ Perhaps it might be added that the difficulty goes beyond the mere act of converting the original agreement into a sale of specific goods, and extends to the more general inquiry as to how far a transfer of property is delayed through the seller's omission to put them into deliverable condition, and then make full delivery, as contemplated under the agreement. For, supposing the agreement had been for so many hogsheads of sugar, to be set apart by the seller, and held by him subject to the buyer's further orders as to destination, and the goods were either paid for in advance or sold on credit, the rule of subsequent appropriation would be reduced to an easier compass.

Let us notice some of the more important cases under the head of appropriation. Where it is incumbent upon the seller, by the terms of the agreement, to select and separate, and then notify the buyer, and this is done, the property passes when the buyer accepts the situation, if not before. Thus, where hogsheads of sugar were ordered out of a bulk, and the seller, after taking out the number ordered, gave notice to the buyer to take them away, which the latter promised to do, it was held that the property in the goods had passed to the buyer.² But was this assent on the buyer's part necessary to complete the appropriation? For surely, in

¹ Benj. Sales, bk. 2, c. 5.

² *Rhode v. Thwaites*, 6 B. & C. 388. And see *Wilkins v. Bromhead*, 6 M. & Gr. 963.

many cases, despatching the separated goods, under circumstances favoring the supposition that the seller meant to shift the property, has been held to make the appropriation complete, without waiting for the buyer's distinct assent.¹ *Atkinson v. Bell* is an extreme case, which rests upon the doctrine, that although the seller has separated and placed them aside, and then has written to the buyer to ask by what conveyance the goods shall be sent, and before receiving an answer goes into bankruptcy, the property does not pass, inasmuch as the buyer has not assented to the appropriation.² Here it might, perhaps, be said, that, notwithstanding the seller gave the buyer his option of a conveyance, he had not distinctly waived all right on his part to control the goods on their transit, nor put the burden of sending to take the goods away absolutely upon the buyer. But the precedent has proved a stumbling-block to the writers, and it is said that, upon other facts shown in the report, the decision was incorrect.³

In *Aldridge v. Johnson*, there was an ascertained bulk of barley, of which a customer agreed to buy a certain quantity. It was left to the seller to determine what specific portion should be delivered under the contract. The agreed equivalent for the barley had mostly been rendered. The buyer sent his own sacks, which the seller was to fill, the latter promising to take the lot to the railway, for conveyance to the buyer, free of charge. The seller filled most of the sacks, but could not at the time procure their conveyance to the railway station, and afterwards apparently changed his mind about sending them at all, though still promising to do so, in response to the buyer's urgent letters. Being on the eve of bankruptcy, the seller finally emptied the barley out

¹ See *Fragano v. Long*, 4 B. & C. 291; *Sparkes v. Marshall*, 2 Bing. N. C. 671.

² *Atkinson v. Bell*, 8 B. & C. 277.

³ See Benj. Sales, bk. 2, c. 5, commenting upon this case.

of the sacks into the bulk, so as to make the whole undistinguishable. On a suit brought by the buyer in trover against the seller's assignees, it was held that the seller, by putting barley into certain sacks which the buyer had sent to be filled, completed the selection on his part, and that there had been full appropriation as to these sacks, which, once made, the seller could not afterwards disturb; while as to the portion not put into sacks the buyer could not recover, for want of a specific appropriation. Here was a good instance of appropriation by act of the seller, without ever putting the goods on the transit; followed, moreover, by the abortive attempt to revoke his own selection before the goods had passed out of his possession.¹ It might be said, perhaps, that there was evidence of the buyer's subsequent assent to the appropriation of the filled sacks, shown by his letters urging that the sacks be sent forward, and complaining of the delay; hardly so, however, and surely with no reference to the filled more than to the unfilled sacks; and the court seems to have squarely rested the case upon the assumption that appropriation had been so left to the seller alone, as to render a subsequent assent unnecessary on the buyer's part, the property passing as soon as the seller had done the outward act signifying his election.² This rule was followed in a later case, where the contract was for peppermint-oil, to be put into bottles furnished by the buyer, and the court deemed the filling the bottles by the seller (who afterwards absconded) a complete appropriation of specific goods to the contract.³

¹ Aldridge v. Johnson, 7 E. & B. 885.

² Campbell, C. J., said: "Looking to all that was done, when the bankrupt put the barley into the sacks, *eo instanti* the property in each sackful vested in the plaintiff." And Erle, J., is still more precise on this point: "Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. Here it is vested in the vendor only, the bankrupt. When he had done the outward act which showed which part was to be the vendee's property, his election was made and the property passed."

³ Langton v. Higgins, 4 H. & N. 402.

But *Campbell v. Mersey Docks* gives another turn to the English doctrine of appropriation. In *Aldridge v. Johnson*, there was, besides the suggested possibility of an actual subsequent assent, something thrown out in the remarks of the Chief Justice to indicate that an "*à priori* assent" might supply the want of a more distinct acquiescence by one party in the other's selection, in order to render appropriation complete. This later case proceeds upon the ground that some kind of assent to an act of appropriation is always needful to pass the property, whether it be express or implied. The "ear-marking" of cotton sent to a warehouse for the buyer was held inconclusive; the buyer repudiating afterwards, on the ground that the cotton was not equal to the samples.¹ While it was here admitted that a warehouseman may be the agent to give assent, it was announced (in language broader than the case required) that there must always be, where the seller is the party to separate, not only an appropriation, but an appropriation to which the vendee has assented in some way or another.² But, once again, in a later case, where twenty tons of best oil had been ordered, deliverable by steamer, and to be sent "free on board," — or on account of the purchaser, — and the goods were shipped by the seller, but lost at sea, it was held, upon a construction of the contract, and the method employed by the seller in taking out the bill of lading and invoices, that the property in the goods passed to the buyer when they were placed free on board, in performance of the contract, and that he must bear the loss.³ The inference to be drawn from the language used in this and still later English cases is, that, on a sale of unascertained goods, the purchaser may, by his conduct, make the seller his agent both to appropriate and give in advance whatever assent may be necessary on his own part, — a doctrine which, if true,

¹ *Campbell v. Mersey Docks*, 14 C. B. N. s. 412.

² See also *Godts v. Rose*, 17 C. B. 229.

³ *Brown v. Hare*, 3 H. & N. 484; 4 H. & N. 822.

is so nearly allied to that of dispensing with an actual assent by the buyer to appropriation by the seller, that only a microscopic eye can detect the distinction.¹ And here the rule of appropriation appears to rest at this day, both in England and America; though, in most parts of this country, mutual intent as a question of fact would be taken as the material issue in cases involving the right of property.²

We have shown how presumptions vary, even as to specific chattels which are made the subject of sale, according as the chattel is or is not in a deliverable state, or that condition in which the buyer is bound to take it.³ Weighing, measuring, and testing, are acts of the utmost consequence oftentimes for identifying property to a sale contract covering unspecified goods; and it may be safely added, that where an article not specific is sold, and something remains to be done to it by the seller before despatching it to the buyer, the transfer of property remains suspended, even though specific chattels be already appropriated to the contract.⁴ It stands to reason, moreover, that where one thing is ordered and another sent, there can be in the setting apart by the seller no perfect sale, and consequently no binding appropriation of specific goods to the contract; any subsequent acceptance by the buyer of goods sent in fundamental variance from his original order, or of goods sent to replace what has once been appropriated to the contract, evincing really a substituted bargain between the parties.⁵ And hence, if goods are

¹ *Brown v. Hare*, *supra*; *Tregelles v. Sewell*, 7 H. & N. 571; *Calcutta Company v. De Mattos*, 32 L. J. Q. B. 322; *Jenner v. Smith*, L. R. 4 C. P. 270.

² *Boswell v. Green*, 1 Dutch. 390; *Merchants' National Bank v. Bangs*, 102 Mass. 195; *Hyde v. Lathrop*, 2 Abb. N. Y. App. 436; *Birge v. Edgerton*, 28 Vt. 291.

³ *Supra*, c. 2.

⁴ See *Prescott v. Locke*, 51 N. H. 94; *Wanamaker v. Yerkes*, 70 Penn. St. 443.

⁵ See *Smith v. Myers*, L. R. 5 Q. B. 429, s. c. L. R. 7 Q. B. (Ex. Ch.) 139, where goods appropriated to the contract were destroyed by an

delivered unreasonably later than the time set, or in excess of the quantity named, or of an altogether different description from those ordered, the party ordering the goods may refuse to receive them; for it cannot be maintained that the seller, whose duty it was to select and separate, has any right to throw the selection from a larger quantity upon the buyer, or stand upon his own misappropriation of goods to the contract.¹ So where a sale is made by sample, and the buyer has not abandoned his right of comparing the bulk with the sample, or of verifying the weight, the seller cannot sue him as for goods bargained and sold, merely by setting aside the specific portion to await orders, and then sending an invoice to the buyer, with a draft for the price, which the latter refuses to accept.² And in those numerous cases of appropriation on condition,—of which a familiar instance is seen in the sale expressly conditioned upon immediate payment,—the title does not pass so as to enable the buyer to sue as owner, unless full delivery to that purport is made by or under the authority of the seller.³ Where, in short, as between buyer and seller, the nature of the case forbids the supposition that they had designed a transfer of property immediately upon the seller's selection and separation of the chattels ordered, the right does not completely pass, though specific chattels are in fact appropriated to the contract. That the interposition of implied conditions embarrasses the whole inquiry concerning a legal transfer of ownership in goods supplied to order, will appear more fully in a subsequent chapter.

earthquake while at the port of lading, and it was held that a contract covering this specific lot was not supplied by a similar cargo afterwards shipped by the same vessel.

¹ *Cunliffe v. Harrison*, 6 Ex. 903; *Levy v. Green*, 1 E. & E. 969; 27 L. J. Q. B. 111; *Benj. Sales*, bk. 2, c. 5; *Downer v. Thompson*, 2 Hill, 137; *Rommel v. Wingate*, 103 Mass. 327.

² *Jenner v. Smith*, L. R. 4 C. P. 270.

³ *Godts v. Rose*, 17 C. B. 229.

Delivery is a circumstance often considered in connection with the appropriation of specific goods. It is doubtless well established, as the rule both of England and America, that where — all other things being equal — a seller delivers goods to a carrier by order of the buyer, the appropriation is determined beyond his power to recall it, for the property¹ has thus presumably vested in the buyer.¹ This rule, however, is subject to the principle of *jus disponendi*, to be hereafter noticed, and may be controlled by special stipulations between the parties.² It was said, in *Fragano v. Long*, by Holroyd, J., that “when goods are to be delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off.”³ This is because a seller who charges for the carriage of goods is presumed to have intended keeping control of them during their transit, and so prevented the property from passing, while the presumption would be to the contrary if the carrier’s charges were to be adjusted between himself and the buyer.⁴ Wherever the goods are sent on trial, or contract of “sale or return,” or with special conditions imposed, the property in the goods remains still in the seller during their transit.⁵ As a matter of fact, appropriation can take place without a delivery, even to a carrier for the buyer; for delivery only manifests quite plainly a selection, which might well be evinced by acts of narrower scope, under fitting circumstances.⁶ But the delivery of

¹ *Fragano v. Long*, 4 B. & C. 219; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Dutton v. Solomonson*, 3 B. & P. 582; *Krulder v. Ellison*, 47 N. Y. 36; *Benj. Sales*, bk. 2, c. 5; *Arnold v. Prout*, 51 N. H. 387; *Wing v. Clark*, 24 Me. 366; *Odell v. Boston & Maine R. R.*, 109 Mass. 50; *Magruder v. Gage*, 33 Md. 344.

² *Supra*, p. 249.

³ *Fragano v. Long*, 4 B. & C. 219.

⁴ See *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Benj. Sales*, bk. 2, c. 5; *Aldridge v. Johnson*, 7 E. & B. 885; *Blanchard v. Page*, 8 Gray, 281.

⁵ *Swain v. Shepherd*, 1 Moo. & Rob. 223.

⁶ See *Aldridge v. Johnson*, 7 E. & B. 885; *Blackb. Sales*, 128.

goods to the buyer or his agent, or some carrier for him, is a palpable act of appropriation by the seller, whose intent thus evinced to transfer the title absolutely to the buyer can hardly be disputed, if the bill of lading be taken out in the consignee's name, or indorsed over to him without restriction.¹

Evidently, this whole subject of appropriating specific chattels to a sale contract, so as to pass the property, is replete with difficulty; and, in view of the controlling influence which mutual intent must always exert over mere presumption, it might well be asked whether the English courts have not labored too much to put a fine edge upon tools of little practical utility. The present results seem to establish, *first*, that various meanings may be assigned to the word "appropriation,"—its more legitimate scope being limited to the selecting, separating, setting apart, and so identifying, specific goods to the sale contract, while in legal discussion the word is often extended through the labyrinth of conditions and special stipulations, so as to comprehend the complete shifting of a title to unspecified chattels from seller to buyer; *second*, that there is doubt under the authorities as to whether an appropriation can in any sense ever be said to take place without an actual assent of some sort by the buyer to the seller's selection,—though, be it on the postulate that the seller was authorized in advance to give the buyer's assent, or that appropriation was made because of the nature of the contract by the seller alone, there can be no doubt that the complete specifying of chattels to the contract, so as ordinarily to carry the property, is, under suitable circumstances, made by the seller, without requiring the buyer's subsequent assent. Concerning the latter point, it is suggested that

¹ *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Magruder v. Gage*, 33 Md. 344; *Griffith v. Ingledew*, 6 S. & R. 429; *Alexander v. Gardner*, 1 Bing. N. C. 671; *infra*, as to *jus disponendi*, and delivery.

where an order is sent for goods of a certain description, at a certain price, there is a proposal; and that by identifying specific property exactly as ordered, and setting it apart at the price for the ordering party, there is an acceptance of the proposal; and the case, at once, stripped of all collateral qualifications and reservations, ought to be that of a full bargain for specific goods, without waiting for the buyer's further acceptance of the seller's acceptance, though the buyer might reserve a right of approval as a prerequisite of property transfer.¹

And as to appropriation, in the sense of rendering the contract of sale one in which the minds of the parties meet on specific goods, the proper rule appears to be, that the party upon whom the first, or it may be the only, act of appropriation devolves, can make his choice by selecting, separating, and setting apart, and so distinctly identifying, the property to the contract; that while these acts are only partially performed, the appropriation on his part is incomplete; but that, upon full performance thereof, his choice is complete and irrevocable as concerns the transfer of property, without the other party's assent. Thus, if the seller offers to sell the buyer certain oil, in casks which the latter shall select from the warehouse, the appropriation devolves upon the buyer, and, upon the latter's selection of the casks and setting them apart, the property presumably vests in him, as under an acceptance of the seller's proposal. On the other hand, if the nature of the agreement leaves the seller to select and set apart the oil, his choice being concluded with the intention unconditionally to set apart for the buyer, the property vests in the latter. But, once more, there may be something in the agreement which shows that to the selection of the one party the other has reserved a right of verifying, participating in, or in some way assenting to,

¹ See *supra*, c. 2, as to the shifting of presumptions, even in the case of sales of specific goods.

the appropriation, so as to make sure that it was the suitable specific chattel contracted for; and here the specifying of goods to the contract requires mutual acts before it can take full effect in vesting the property of goods in the buyer. Intent, in any case, is the paramount consideration; the practical difficulty being to ascertain this intent when there is scanty evidence.

What shall constitute appropriation so as to carry the title to chattels manufactured to order? In *Mucklow v. Mangles*, it is held that no property shall vest in an unfinished chattel until it is finished and delivered. Here a barge-builder had undertaken to build a barge to order; the party for whom it was ordered had advanced money before the work was begun, and afterwards paid to its full value; and the work, still under the builder's control, had just been completed, to the painting of the party's name on the stern. But, as the builder had not delivered or tendered the barge to the party for whom it was intended, the property therein was adjudged to go to the maker's assignees in bankruptcy, and not to the intended buyer.¹ *Tripp v. Armitage*, likewise the case of a bankrupt builder, involved the title to sashes and other building materials used in constructing a house to order; and it was held that, there being no bargain for the specific articles, but a contract to make up materials and work them into the house, the property therein did not pass until they were affixed to the freehold.² In *Fairfield Bridge Co. v. Nye*, a bridge-builder's creditors attached materials before the work was done, though partially paid for; and it was held that the title to the unfinished piers had not as yet passed from the builder to the bridge company.³ A tender of the finished

¹ *Mucklow v. Mangles*, 1 Taunt. 318. And see *Merritt v. Johnson*, 7 Johns. 473.

² *Tripp v. Armitage*, 4 M. & W. 687. And see *Johnson v. Hunt*, 11 Wend. 135.

³ *Fairfield Bridge Co. v. Nye*, 60 Me. 372.

chattel, followed by the customer's refusal to take it, is held insufficient to pass the property from the maker; and so with other evidence of a disposition not to accept the appropriation.¹ But, on the other hand, in *Wilkins v. Bromhead*, the appropriation of a green-house made to order was considered complete so as to transfer the property to the buyer, where the latter, on being informed that the article was finished, remitted the price as requested, without seeing it, and asked the builder to keep the green-house until he should send for it.² And the buyer is held to have sufficiently assented to the appropriation, so as to enable the maker to sue as for goods bargained and sold, where, notwithstanding his delay to pay in full, he admits that the chattel was made to his order, and by acts manifests the accepting conduct and disposition.³

The leading principle still to be traced is that of appropriation; but here the circumstances should show, according to the current of authority, not so much that a price had been paid, or appropriation made by the seller, as that there had been some mutual act of the parties, with or without payment, by which the manufactured thing when finished, or nearly so, was offered and accepted, whether expressly or by implication, as a fulfilment of the contract to furnish it. Nor matters it, so far as rights and risks of title to the unfinished chattel are concerned, that the buyer was to furnish certain things necessary to their completion; the maker is as yet the owner.⁴ But the appropriation of the thing having once been clearly manifested, and the chattel, being already manufactured, delivered in a state of completion to the buyer, and

¹ *Moody v. Brown*, 34 Me. 107; *contra*, *Bement v. Smith*, 15 Wend. 493. And see *Halterline v. Rice*, 62 Barb. 593; *Gammage v. Alexander*, 14 Tex. 414; *McIntyre v. Kline*, 30 Miss. 361; *Rider v. Kelley*, 32 Vt. 268.

² *Wilkins v. Bromhead*, 6 M. & Gr. 963.

³ *Elliott v. Pybus*, 10 Bing. 512; *Goddard v. Binney*, 115 Mass. 450. And see *Story Sales*, §§ 233, 315; *Benj. Sales*, bk. 2, c. 5.

⁴ *McConihe v. N. Y. & Erie R. R. Co.*, 20 N. Y. 495.

substantially accepted by him and paid for, — acts more than sufficient, ordinarily, for appropriating specific chattels to the contract, — the transfer of property will be presumed to have taken place, notwithstanding special reservations under the agreement for the purpose of securing the buyer against possible faults in the construction of the chattel, provided such reservations do not amount to a postponement of property transfer altogether until the chattel has been tested.¹

But, where the intent of the parties has been distinctly manifested to the effect that the property shall vest in the purchaser before the article is fully made, this intent shall prevail. One circumstance of material bearing relates to the method of purchase; as, for instance, the payment of the purchase-money by instalments at different stages, though the advance even of the whole purchase-money would be by no means decisive.² Another influential circumstance is that of employing some overseer or other agent, on behalf of the intended buyer, to superintend the work as it advances. Yet the stipulation for employment of this kind is not necessarily inconsistent with a right of ownership of the unfinished chattel reserved in the maker; the extent of such superintendence somewhat affecting the case.³ These two circumstances conjoined, however, are so greatly favored for overcoming the presumption of property in the maker, in certain English shipbuilding cases, that a rule is sometimes deduced from them which the American decisions do not appear equally to sanction. Thus, as a rule of construction, to determine the mutual intent in shipbuilding contracts, the English cases

¹ *Mount Hope Iron Co. v. Buffinton*, 103 Mass. 62. Here an engine was made to order, delivered, and paid for, but a margin was reserved until the engine should "be started in a satisfactory manner." The case was distinguished from *Phelps v. Willard*, 16 Pick. 29.

² See *Mucklow v. Mangles*, 1 Taunt. 318; *Merritt v. Johnson*, 7 Johns. 473; *Fairfield Bridge Co. v. Nye*, 60 Me. 372; *Halterline v. Rice*, 62 Barb. 593.

³ See *Tripp v. Armitage*, 4 M. & W. 687.

hold, that, if the intended buyer is to put his own superintendent over the work, and pay by instalments, this is equivalent to an express provision, that, on payment of the first instalment, the general property in so much of the vessel as is then constructed shall vest in the buyer, and so on with the payment of further instalments.¹ But in some American cases, presenting similar facts, the contrary has been held; and the doctrine of this country appears to be against presuming a mutual intent for transfer of property in an unfinished ship or other chattel, to attach at different stages on payment of instalments, and because of the supervision of the work on the intended buyer's behalf; but rather to require the buyer to wait for his title until the work is completed.² Yet neither in England nor America is this question treated as other than one concerning the interpretation of a contract, to ascertain the true intent of parties; the point of difference between the cases not being vital, but going only to construction and the burden of proof.³

Appropriation, in short, may take place in any unfinished article as such, so as to transfer to the buyer the ownership

¹ *Woods v. Russell*, 5 B. & Ald. 942; *Clarke v. Spence*, 4 Ad. & El. 467; *Wood v. Bell*, 5 E. & B. 772; s. c. 6 E. & B. 355. These decisions upheld the buyer's title as against the seller's assignees in bankruptcy. In *Woods v. Russell* there were other special circumstances, on which little stress was laid, but tending to show property in the buyer, such as the registry of the vessel in the buyer's name. Some extra-judicial expressions in this case tending to broaden the rule so as to allow of a specific appropriation of parts of an incomplete chattel while in progress of manufacture, are discountenanced by *Clarke v. Spence*, which tends to limit the doctrine. *Wood v. Bell* follows the authority of the two former cases. As to the builder's lien for unpaid instalments under such contracts, see *In re Lindsay*, L. R. 10 Ch. 405.

² *Andrews v. Durant*, 1 Kern. 35; *Elliott v. Edwards*, 6 Vroom, 265; *Green v. Hall*, 1 Houst. 506; *Story Sales*, § 234; *Williams v. Jackman*, 16 Gray, 514; *Briggs v. Light Boat*, 7 Allen, 287. But *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522, prefers the English rule.

³ See Bigelow, C. J., in *Briggs v. Light Boat*, *supra*; *Elliott v. Edwards*, *supra*.

thereof, as in a specific chattel. For instance: a party who agrees to purchase a vessel as it then stands, leaving the work of finishing it out of consideration in his contract of sale, makes a perfectly valid bargain for a specific thing; though buying it under a contract to have it finished and delivered would be quite a different matter.¹ Ordinarily, a contract for the sale of a chattel not yet finished must be regarded as executory; but, if the parties have manifested their intent that the transfer of property shall take place in the unfinished product at once, that intention will take effect. On this ground is justified a late English decision, rendered upon a somewhat extraordinary state of facts, and to the effect that the property in the chattels had passed to the buyer. A brickmaker in embarrassed circumstances agreed to sell to one of his creditors a large quantity of unfinished bricks. The buyer, who had in fact by his advances paid full consideration, sent his agent to take delivery. The bricks were distinctly ascertained and pointed out. The buyer's agent then asked, "Do I clearly understand that you are prepared, and will hold and deliver this said quantity of bricks?" And the answer was, "Yes."²

But as to materials designed for an unfinished chattel, and not affixed thereto, — such as cordage, or a rudder, bought for some particular ship by the seller of the ship, — it will still be presumed, notwithstanding a constructive change of ownership in the unfinished chattel, that the property to these still remains in such seller, if they have not been so incorporated with the principal thing as to become part of it.³ The

¹ See *Laidler v. Burlinson*, 2 M. & W. 602.

² *Young v. Matthews*, L. R. 2 C. P. 127. Cf. *Crofoot v. Bennett*, 2 Comst. 258.

³ *Wood v. Bell*, 5 Ell. & B. 772; 6 Ell. & B. 355; *Tripp v. Armitage*, 4 M. & W. 687; *Johnson v. Hunt*, 11 Wend. 135; *contra*, *Woods v. Russell*, 5 B. & Ald. 942; *Goss v. Quinton*, 3 M. & G. 825.

mutual agreement of the parties, clearly expressed, may affect this rule, however.¹

The approval of the buyer's own agent will conclude the buyer himself as to acceptance of work made to order; but this approval must go directly to the point of accepting the product.² Acceptance merely with the intent of pronouncing materials suitable for the structure constitutes no acceptance of the structure into which those materials are worked.³

On the whole, it may be said that the rule as to chattels manufactured to order is not different in essence from that of other chattels not specific, which require appropriation; only, since we are still regarding presumptions, that the buyer's assent given in advance, or the seller's appropriation made without distinct assent to the appropriated thing on the buyer's part (which, we have seen, may often suffice, in the general instance of unspecified goods under a contract of sale, to accomplish the transfer of property, or at least the risks of title, from seller to buyer), is not so readily presumed to have effected the full transfer of a thing not existing at all when ordered, requiring more than separation and setting apart, or even selection, and necessarily dependent, for its intrinsic value, upon the quality of the workmanship bestowed upon it. If I order so many gallons of a certain oil from a reputable firm, I may readily be supposed to have left to them the separation and setting apart, or, as some would say, given my assent to the appropriation in advance; not so readily, however, where I order a carriage built after a certain pattern. Common prudence suggests, in the latter case, a suspension of transfer until the work, substantially finished,

¹ *Brown v. Bateman*, L. R. 2 C. P. 272.

² *Young v. Matthews*, L. R. 2 C. P. 127; *Clarke v. Spence*, 4 Ad. & El. 467.

³ *Tripp v. Armitage*, 4 M. & W. 687.

has been examined or tested, or, at all events, admitted to be satisfactory. The manufacturer is not supposed to be an unbiassed judge of his own workmanship, though an honest merchant might be of goods on hand for sale. And yet the parties to a contract may make it what they like, and give the advantages of a bargain to one or the other. That the circumstances attending a particular transaction for manufacturing chattels to order may have been such as to disclose a mutual intent that the property, or at least the risks attending title, to the thing, when finished, shall pass to the customer, without awaiting his subsequent acceptance; that upon the interpretation of some such contracts a court might pronounce that the buyer had previously authorized the seller to make full appropriation for him, with much the same consequences as in other instances of appropriating specific chattels to a contract of sale, — we have little question.¹

The doctrine of property transfer in chattels not specific becomes still further complicated by the circumstance, often indicated by the authorities, that the ownership may designedly pass for some purposes, and not for others. Thus, under certain contracts presented for judicial consideration, the buyer may be plainly saddled with the risks of loss before the goods come to his possession, while yet it is doubtful whether the rights of property, the privileges of ownership, have passed to him.² Again, it is a principle supported by many American authorities, that title to personal property may have passed, as between the parties to the contract of sale, and nevertheless, for want of an actual, visible, and

¹ See *Goddard v. Binney*, 115 Mass. 450.

² Cf. opinions of judges in *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322; *Castle v. Playford*, L. R. 5 Ex. 165; *Martineau v. Kitching*, L. R. 7 Q. B. 436.

substantial change of possession, be pronounced invalid against the seller's creditors, on the ground that one gains a fictitious credit with the public by seeming to be the owner of that which does not in fact belong to him.¹

¹ See *Birge v. Edgerton*, 28 Vt. 291; *Lewis v. Swift*, 54 Ill. 436; *Miller v. Garman*, 69 Penn. St. 134; *First Nat. Bank v. Crowley*, 24 Mich. 492. But the general rule in England and America is, that the continued possession by the seller of goods he has sold is a fact going to show fraud upon creditors, but not such a fraud *per se*. *Benj. Sales*, bk. 3, pt. 2, c. 2, § 4; *Martindale v. Booth*, 3 B. & Ad. 498; 2 Kent Com. 515; *infra*, c. 17.

CHAPTER IV.

SELLER'S RESERVATION OF THE JUS DISPONENDI.

BEFORE passing from the subject of property transfer in chattels, specific and non-specific, it is proper to notice how the general rules of construction may be affected by the seller's reservation of rights which are inconsistent with an intention on his part of absolute and immediate surrender of ownership to the buyer. The seller naturally seeks payment for his goods before finally parting with them, and acts accordingly, however much he may choose to disguise the motive, out of delicacy towards his customer. This holding back of the seller's title is known in the courts as the seller's reservation of the *jus disponendi*, and the rules apply usually to goods the subject of bargain between parties who are far apart, and to unspecified goods ordered by the buyer rather than to specific property; and though the seller's usual reason for holding his right of ownership is to secure his price, he may doubtless pursue the same course from other motives.

It cannot too often be repeated, in the course of our present investigation as to the leading consequences of a contract of sale, that intention of the parties is, after all, the fundamental inquiry; that all the roads, however circuitous, lead to the same centre; and hence that the final issue in any case becomes a simple one of fact, for which very reason legal rules of presumption must often appear contradictory. It follows that, notwithstanding one may have ordered chattels to be sent him, which the seller has fully appropriated to the contract, — in other words, notwithstanding a bargain has been made between the parties of specific goods, — the property

therein cannot pass to the buyer, so long as the seller's acts with reference to the chattels is such as to repel the usual inference. The act of appropriation is, under such circumstances, said to be provisional or conditional; and it is often a nice question to determine whether appropriation in a certain case is of this character or an absolute one.¹

The cases under the present head are arranged with especial reference to the method of making delivery through a carrier. In the delivery of ordered goods to a common carrier, as we have shown, or to the buyer's own agent, or to the buyer himself, the presumption is, that appropriation is an accomplished fact, and the title has finally passed to the buyer.² Placing the goods in the buyer's own receptacle — whether it be on board his vessel, or into sacks, casks, and the like, furnished by him — is a strong circumstance indicative of an executed intention to appropriate on the seller's part.³ But it would be different where the seller sends goods not ordered, in the hope of making a sale; for that delivery to a carrier which charges a purchaser, as delivery to him from the seller, must have been under some express or implied authority from the purchaser.⁴

Now, supposing the seller, in sending goods by a vessel or other carrier, to have taken out a bill of lading or similar document, a new circumstance is presented. The rule of presumption becomes this, that the carrier thereby agrees to take the goods as bailee for the person whose name is therein indicated as the one for whom the goods are to be carried;⁵

¹ Benj. Sales, bk. 2, c. 6.

² *Supra*, p. 256. This rule extends to a delivery made to a warehouseman for the buyer. *Hunter v. Wright*, 12 Allen, 548. And see *post*, Delivery.

³ See *Aldridge v. Johnson*, 7 E. & B. 885; *supra*, p. 256; Coleridge, C. J., in *Ogg v. Shuter*, L. R. 10 C. P. 159.

⁴ *Cobb v. Arundel*, 26 Wis. 553.

⁵ *Brandt v. Bowlby*, 2 B. & Ad. 932; *Wilmshurst v. Bowker*, 7 M. & Gr. 882; *Ellershaw v. Magniac*, 6 Ex. 570; Benj. Sales, bk. 2, c. 6;

and, this bill being made out to the seller or order, the carrier's engagement is *prima facie* to carry the goods for and on account of the seller, to be delivered to him in case it should not be assigned or indorsed; but if it should, then to his assignee or indorsee.¹

This doctrine is applied in a leading English case, where the seller had agreed with the customer for payment of price on delivery of the bill of lading. The bill of lading, made out to the seller's order, was brought to the customer, and presented unindorsed; the latter made sundry objections to the sale; and when he finally offered the price, and said, "I accept," the seller refused to take his money and indorse over, but took the bill from the counter and presently sold the goods to another customer, indorsing the bill to him. The goods afterwards arrived in port, and, their market value having risen considerably, the first customer went and took part of the cargo; but the court held that, by reserving the *jus disponendi* under the bill of lading, the seller had been enabled to defeat the sale, and that the second customer could sue the first in trover as owner of the cargo.²

This rule of presumption holds good, even though the goods be delivered on what might be termed the buyer's own vessel; the question being not one of a carrier's authority from

Wait *v.* Baker, 2 Ex. 1; Key *v.* Cotesworth, 7 Ex. 595; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 295; Griffith *v.* Ingledew, 6 S. & R. 429; Blanchard *v.* Page, 8 Gray, 281; Shepherd *v.* Harrison, L. R. 4 Q. B. 196; s. c. L. R. 4 Q. B. 493; s. c. L. R. 5 H. L. 116; Halliday *v.* Hamilton, 11 Wall. 560; Marine Bank *v.* Wright, 48 N. Y. 1; Ward *v.* Taylor, 56 Ill. 494.

¹ *Ib.* There is no rule of law, which, in absence of usage, obliges the seller of goods who delivers them to a railroad company to be first transported on their road, and thence forwarded by the company on a steamboat to the purchaser, to take out an "internal bill of lading," and send it to the purchaser at or about the time of despatching the goods; nor requiring a railroad company to give a bill of lading for goods delivered them for transportation. Johnson *v.* Stoddard, 100 Mass. 306.

² Wait *v.* Baker, 2 Ex. 1.

the buyer, but whether the captain or other carrier took the goods with the qualification which the seller had the right to impose before delivering them at all.¹ But no fraudulent procurement of bills of lading in his favor can avail the seller to obstruct the acquisition of title in the buyer.²

The *prima facie* case afforded by the circumstance of taking out a bill of lading to the seller's order may be rebutted by proof that the seller, though pursuing this form, did so with the intent, nevertheless, of divesting himself of the rights of property. Thus, where a seller had indorsed the bill of lading to the buyer specially, sending it to his own agent, and the goods were lost before the bill was delivered to the buyer, it was held upon the facts that the buyer must bear the loss; the contract being here to ship the goods "free on board."³ It is not always easy, however, to reconcile such cases with those following the ordinary rule, unless it be explained by the manifest reluctance of the courts to make a seller's precautionary measures, taken simply for securing his rights, redound to the advantage of the other party, so as to exempt him from the ordinary risks of transit. Chief Justice Cockburn has observed upon this discrepancy, that there is much reason for holding in some of the cases that while the property had vested in the buyer the seller retained possession, with a lien for the purchase-money.⁴

Sometimes a bill of lading is accompanied by a bill of exchange, drawn by the seller upon the buyer for the price, his expectation being that the bill of exchange will be accepted concurrently with a vesting of property under the indorsed bill of lading. The effect of such a transaction is to make delivery

¹ Wait *v.* Baker, 2 Ex. 1; Turner *v.* Liverpool Docks, 6 Ex. 543; Falk *v.* Fletcher, 18 C. B. N. s. 403.

² Ogle *v.* Atkinson, 5 Taunt. 759.

³ Brown *v.* Hare, 3 H. & N. 484; s. c. on appeal, 4 H. & N. 822. And see Van Casteel *v.* Booker, 2 Ex. 691; Joyce *v.* Swan, 17 C. B. N. s. 84.

⁴ Cockburn, C. J., Shepherd *v.* Harrison, L. R. 4 Q. B. 196.

of the bill of lading ineffectual for divesting the seller of his right of ownership in the goods, unless the price is adjusted by the buyer's simultaneous acceptance of the bill of exchange; and if the buyer declines such acceptance, he has no right to keep as his own either the bill of lading or the goods which they represent. *Shepherd v. Harrison* is a late decision upon this point, which presents an able exposition of the whole law of *jus disponendi* reservations, as viewed by the highest tribunals of Great Britain. The House of Lords and Courts of Exchequer Chamber and Queen's Bench concurred in opinion as to the effect of a bill of lading when accompanied as above;¹ and the same rule prevails, doubtless, in this country.² Upon bills of exchange, with bills of lading thus attached, advances are frequently made by third parties, by way of a loan on the security of the merchandise; and the pith of the matter is, that the party who discounts the bill of exchange for the seller, upon security of the bill of lading, acquires property in the chattels therein described, conditional upon acceptance of the draft by the buyer. Upon his acceptance of the draft, the property in the chattels passes to the buyer; but, upon his refusal to accept, the title continues unimpaired, and the buyer receiving the chattels is liable accordingly.³

Concerning the property in chattels sold on condition that they shall be paid for on delivery, we shall speak in the next chapter. Nor should this reservation by the seller of the *jus disponendi* be confused with the special right of stoppage *in transitu*, in certain cases of a buyer's insolvency.⁴ The seller's exercise of the *jus disponendi* is in pursuance of a reservation

¹ *Shepherd v. Harrison*, L. R. 4 Q. B. 196; s. c. L. R. 4 Q. B. 493; s. c. L. R. 5 H. L. 116.

² *Halliday v. Hamilton*, 11 Wall. 560; *Marine Bank v. Wright*, 48 N. Y. 1.

³ *Marine Bank v. Wright*, 48 N. Y. 1; *Halliday v. Hamilton*, 11 Wall. 560. And see *Nat. Bank of Commerce v. Merchants' Nat. Bank*, U. S. Supr. Ct. 1875.

⁴ This right is considered, *post*.

consistent only with the intention on his part to preserve his rights of ownership. It is most strenuously insisted, under the latest authorities, that all the surrounding circumstances are material to an issue of this kind ; that the judges sit like jurymen, to weigh all the evidence, and determine, as a fact, whether the intention was to transfer or withhold the seller's rights as owner. The stipulation for payment against a bill of lading is a strong circumstance against the divesting intent ; but its effect is subject to countervailing circumstances in the buyer's favor, such as a stipulation for delivery "free on board," part payment, the tenor of the invoices and bills of lading, the fact of placing the goods in the buyer's receptacle, and so on.¹ Delivery of a bill of lading, with the intent to pass the property, has that effect, certainly in some of our States, without even the technical indorsement.² And, upon all the facts, it was quite recently decided that the property in merchandise shipped to the buyer's order had passed so as to entitle the buyer to maintain trover, although the bill of lading indorsed in his favor was presented by the seller's agent, together with a draft for acceptance, and the buyer, erroneously supposing the shipment to be short, refused to accept at once, but offered either to pay at once, with such deduction allowed him, or else promptly accept, if, upon discharging the vessel, the cargo should prove to be a full one. It is quite likely that the harshness displayed by the seller's agent in insisting upon immediate acceptance, without giving the slightest opportunity to verify the cargo, turned the scale in the buyer's favor. This case well illustrates the impossibility of compressing the law on this whole subject into any exact system of rules ; intention of the parties is still the controlling principle.³

¹ See *Ogg v. Shuter*, L. R. 10 C. P. 159; opinions in *Shepherd v. Harrison*, *supra*.

² *City Bank v. Rome, &c.* R. R. Co., 44 N. Y. 136.

³ *Ogg v. Shuter*, L. R. 10 C. P. 159.

CHAPTER V.

CONDITIONS.

THE leading rules of construction which have been pointed out in the three preceding chapters receive constant allusion from the courts as operating by way of a condition precedent to the transfer of property. Thus, the proposition that property in a specific chattel does not presumably pass while something remains to be done by the seller to put it into a deliverable state, is stated by Judge Blackburn as affording a presumption that the performance of the thing shall be taken as a condition precedent to the vesting of the property.¹ So is the genuineness of the thing sold, or its actual existence, frequently spoken of as a condition.² In sales, too, which require payment on delivery, sales by description, and the like, there is much to be found in the books about an implied condition in the contract, — not to speak of those more obvious, because more clearly expressed, conditions of sale which parties are always free to introduce when they will, as an element of their mutual assent. That we may entertain clear ideas, if possible, upon what has become doubtless a very perplexing branch of the law of sales, and, indeed, of contracts generally, let us briefly advert to some of the leading principles.

I. As to conditions generally. The modern rule on the subject of conditions in contracts, and the only one, however indefinite and unsatisfactory it may be, which appears to

¹ *Supra*, p. 231; Blackb. Sales, 151, 152. And see Benj. Sales, bk. 2, c. 3, *passim*.

² *Ib.*

reconcile the numerous conflicting cases under this head, is that the mutual intent of the parties, as shown by the facts in any given case, must ultimately prevail ; a principle which runs through the whole subject of property transfer in chattels by sale, as our preceding chapters indicate. Mr. Parsons observes on this point, that it would be difficult, and perhaps impossible, to lay down rules which would decisively determine the vexed question ; but, he adds, the late rule is, that it must depend upon the intention of the parties, to be collected in each particular case from the terms of the agreement itself, and from the subject-matter to which it relates.¹

Any executory contract between two parties will be found, upon analysis, to be made up of stipulations ; the one engaging to do one or more things, and the other likewise engaging in return. Though these stipulations may not all have been expressed in so many words, they are nevertheless there, and are inferable, at least, from the nature and subject-matter of the contract, which may be more or less complex, according to circumstances. Now, in construing the stipulations of any given agreement, the question will occur, whether certain stipulations are independent or mutual ; whether that which one of the parties has engaged to do must be performed absolutely, and independently of the other, or, on the other hand, depends upon the performance by the other party of his corresponding engagement. If the stipulation be one of the former kind, or independent, the party is bound to perform what he has undertaken to do, without reference to the other party's discharge of his own obligation ; and, conversely, any breach thereof on his part will not justify the other party in repudiating the contract altogether, but simply enables him to maintain a cross-action for damages. But in stipulations of the latter kind, the dependence of the one party's

¹ 2 Pars. Contr. 2d ed. 525-527. And see *ib.* 528, 529; *Benj. Sales*, bk. 4, pt. 1; *Jones v. Barkley*, 2 Doug. 684; *Cutter v. Powell*, 6 T. R. 320; 2 Sm. Lead. Cas. 17-66; *Story Sales*, §§ 252, 253.

engagement upon the corresponding engagement of the other is so thorough, that performance on the one side is a condition precedent to performance on the other.¹ The two kinds are often hard to distinguish, as Mr. Benjamin illustrates from English decisions relative to charter-parties, where a stipulation that a vessel will sail or receive cargo on a day named is held to be conditional, while stipulations that the vessel shall sail with all convenient speed are regarded as independent.²

No precise words are necessary to render a stipulation conditional rather than independent; nor does the collocation of words in an instrument settle the question; and the only practical difference between oral and written contracts in this respect is, that the one class usually calls for interpretation by the court, and the other by the jury. The evident sense and meaning of stipulations, as to dependence or independence, must be gathered from a careful consideration of the whole agreement, its nature, and the various things contemplated for performance: in sales, from a due regard to the entire transaction, in its nature and objects, as viewed on both sides.³ Moreover, the self-same expression, which, under one state of facts, would be construed into a mere independent stipulation, might, under another, prove a condition precedent of the most momentous sort; as, in the latter instance, if one engages to send goods by a vessel described as "an American vessel," not because there was mutual indifference felt on the point of the ship's nationality, but so as to avoid the danger of confiscation in time of a European war by sending under a different flag.⁴

¹ 2 Pars. Contr. 528, 529.

² Benj. Sales, bk. 4, pt. 1; Seeger v. Duthie, 8 C. B. N. S. 45; M'Andrew v. Chapple, L. R. 1 C. P. 643.

³ See 2 Pars. Contr. 525-527; Jones v. Barkley, 2 Doug. 684-691, per Lord Mansfield; Shaw, C. J., in Cadwell v. Blake, 6 Gray, 402; Story Sales, § 252; Schworer v. Boylston Market, 99 Mass. 285.

⁴ See Williams, J., in Behn v. Burness, 3 B. & S. 751.

Where stipulations are mutual and dependent, the precedence of the condition is frequently to be inferred from the order of time in which the transaction, as truly intended by the parties, requires performance; a test which, of course, must be applied naturally, and not in any forced sense.¹ Thus, if goods are to be sent on trial, and subject to the buyer's approval, delivery by the seller becomes a condition precedent to his recovering payment of the price.² So, if a manufacturer agrees to make a machine after a certain model to be furnished by his customer, the customer's engagement to furnish a model comes first in point of time, and is a condition precedent to the fulfilment of the seller's engagement to manufacture.³ And it is a familiar rule of construction, that where a day is appointed for doing any act, and the day is to happen, or *may* happen, before the promise by the other party is to be performed, the latter may bring action thereon before his own performance, which is not a condition precedent; otherwise, if the day fixed is to happen after the performance, since his performance would then be deemed a condition precedent.⁴

But, once again, where the stipulation of one party is to be performed at the same time with the stipulation of the other, these are concurrent conditions; and the party who would maintain an action must show performance, or an offer of performance, on his own part. Of this rule a striking illustration is afforded in the sale of goods for cash on delivery, — a subject to be presently discussed.⁵

But there is still another point to be here considered; namely, the extent to which a stipulation may affect the consideration of the whole contract: and this subject is perhaps

¹ *Ib.*

² See *Moss v. Sweet*, 16 Q. B. 493.

³ *Savage Man. Co. v. Armstrong*, 19 Me. 147.

⁴ 1 Wms. Saunders, 320 *b*; *Cutter v. Powell*, 6 T. R. 320; 2 Sm. Lead. Cas. 17-66; *Benj. Sales*, bk. 4, pt 1.

⁵ *Ib.*; *Dana v. King*, 2 Pick. 155; *infra*, p. 290 *et seq.*

the hardest of all to reduce to rule. It is justly maintained by the courts, that even though a stipulation were, under ordinary circumstances, to be deemed a condition precedent, yet the acceptance by the other party of a substantial part of that which was to be performed on this side should change it into an independent promise; in other words, that one who receives a partial consideration should not be relieved from performance of his own engagement merely because he has not received the whole. Mutual promises, which go to the whole consideration on both sides, are mutual conditions precedent; but a promise which goes only to a part of the consideration is rather an independent stipulation, damages for its breach affording the injured party sufficient indemnity, under the usual contingencies.¹

The general maxim which the courts apply to conditional contracts is, that one party who would hold the other bound must show that he has fully performed to the letter every condition precedent which the contract by its terms put upon himself, save only (1st) so far as the other party has prevented or waived performance of such condition; to which exception may be added (2d) certain other cases where performance has become impossible through circumstances independent of the other party's conduct.²

As to the first exception, which grows out of the opposite party's own acts and conduct, it is clear law that an obstruction of performance, which renders one's act of performance impossible, puts the obstructing party at fault, and renders him liable for the consequences. Hence, as it is tersely stated, the performance of a condition precedent by the plaintiff, which has been rendered impossible by the defendant's neglect or default, "is equal to performance."³ So,

¹ Benj. Sales, bk. 4, pt. 1; *Cutter v. Powell*, 2 Sm. Lead. Cas. 17-66; *Heilbutt v. Hickson*, L. R. 7 C. P. 450.

² *Cutter v. Powell*, *supra*; Benj. Sales, bk. 4, pt. 1.

³ Ashhurst, J., in *Hotham v. East India Co.*, 1 T. R. 645.

too, a positive, absolute refusal by one party to carry out the terms of the contract, or conduct which in effect renders his own promise incapable of performance, is held to exempt the other party from going through the idle ceremony of tendering performance of the condition precedent which the contract exacted of him; and, whether we regard such conduct as amounting to prevention of performance, or an implied waiver on the part of the opposite party, he who has bound himself to the performance of a condition precedent is relieved from fulfilling the engagement when the other prevents him from fulfilling it.¹ And that there may be an express waiver of the condition by the one, so as to excuse performance by the other, is a natural sequence from the fundamental proposition that parties to a contract may rescind and modify its terms at pleasure by mutual consent. But the mere assertion by one party that he will not or can not carry out his own engagement, or stand by the contract, is not so positive an obstruction as relieves the other from tendering performance of his own stipulated condition precedent: before he may sue as for breach of contract, there must be, at all events, a clear and distinct refusal, and this, under most circumstances, to the extent of putting its retraction out of the question.²

As to our second exception, — an impossibility of performance under the circumstances, independently of the other party's conduct, — the law is to be laid down with great caution. Impossibility of performance is still at the root of the matter; but, unlike the case of impossibility resulting from the acts of the other party, the loss here must, in general, fall upon him who had engaged without sufficiently guarding himself against the contingency. The party cannot perform,

¹ *Cutter v. Powell*, *supra*; *Benj. Sales*, bk. 4, pt. 1.

² *Frost v. Knight*, L. R. 5 Ex. 322; 7 Ex. 311; *Burtis v. Thompson*, 42 N. Y. 246; *Smoot v. United States*, 15 Wall. 36.

it is true; yet the law still regards him as bound by his promise, and refuses to relieve him from the harsh consequences which ensue from non-performance.¹ Particularly does this hold good when a contingency happens which a prudent man might have provided against, such as a stipulation to have a vessel ready to receive a cargo by a certain day, the party making no reservation for possible delays in getting her into the pier; or a contract to deliver coal with a certain despatch, which is made regardless of the circumstance that a frost setting in might preclude the intended despatch.² But how shall we apply the rule in the more remote and unforeseen exigencies? It is the English doctrine that impossibility of performance arising from the inherent nature of the thing, or so rendered by the act of God, sufficiently excuses the engaging party for non-performance; for, as Judge Blackburn remarks, there is an implied condition that the impossibility which arises from the perishing of the person or thing shall excuse the performance.³ This tacking of an implied condition upon an expressed condition precedent is, perhaps, a roundabout way of saying that if, upon reasonable construction of the whole contract, it appears that any impossibility occasioned under such circumstances must have been mutually understood beforehand to exempt from performance, the binding force of the stipulation will be limited accordingly. To this latter result the best of the American authorities appear to tend, in harmony with the English. But that the "act of God," so called, — meaning usually inevitable accident, — ought, as a matter of course, to exempt from performance, is expressly denied in the courts of some

¹ Benj. Sales, bk. 4, pt. 1; *Rugg v. Minet*, 11 East, 210; *Taylor v. Caldwell*, 3 B. & S. 826; *Dexter v. Norton*, 47 N. Y. 62; *Knowles v. Dabney*, 105 Mass. 437.

² See *Kearon v. Pearson*, 7 H. & N. 386; *Barker v. Hodgson*, 3 M. & S. 267.

³ *Taylor v. Caldwell*, 3 B. & S. 826.

of the United States; and there are certainly contracts involving exposure to some special peril or hazard, which could hardly be so construed upon implication, without too greatly encouraging laxity on the part of those who might have foreseen, and should have made express reservation.¹

A *legal* impossibility, it is frequently observed, excuses a party from performance. This, however, as it may be surmised, not so much for the reason that some intervening statute renders a lawful performance impossible by means beyond the control of the parties themselves, as because contracts are well presumed to carry the implication on both sides, that, if the law of the country shall, before full performance, render a conditional stipulation on either side unlawful, its performance shall not be attempted. The promise to do an illegal act is, of course, without legal force; and presumptions are naturally against the intention of assuming unlawful engagements.² But illegality, as understood of laws or regulations of a foreign power, does not cut so deeply; and there are instances where a party bound to the condition precedent of loading or unloading abroad, under a shipping contract, can claim no exemption from full performance because of merely foreign local regulations closing the port.³

The strict rule, which requires every party bound to a condition precedent to fully perform what he has without express qualification undertaken to do, might then, upon the whole, be pronounced subject to these two leading exceptions, — (1) a mutual modification or rescission, suggested by the other party's waiver; (2) the impossibility of performance under circumstances which, upon a reasonable interpreta-

¹ See *Mill Dam Foundry v. Hovey*, 21 Pick. 441, *per* Shaw, C. J.; *Knowles v. Dabney*, 105 Mass. 437.

² 1 Salk. 198; *Davis v. Cary*, 15 Q. B. 418; *Benj. Sales*, bk. 4, pt. 2; *Baily v. De Crespigny*, L. R. 4 Q. B. 180.

³ See *Barker v. Hodgson*, 3 M. & S. 267; *Kirk v. Gibbs*, 1 H. & N. 810. But see *Ford v. Cotesworth*, L. R. 4 Q. B. 127.

tion of the whole contract, may well be thought to have constituted a mutually understood exemption from performance.

II. To apply the foregoing principles to contracts of sale. It is an elementary principle, that, where there is a condition precedent or concurrent embodied in a contract of sale, upon the performance of which the transfer of property depends, the buyer will acquire no property in the thing before that condition has been fulfilled; the right of ownership, notwithstanding delivery of the chattel, continuing in the seller meanwhile, even against the buyer's creditors.¹ This is in full accordance with the *jus disponendi* and other doctrines, already set forth at length, and will presently be exemplified still more fully. Other conditions precedent on the buyer's part than that of payment may doubtless be introduced; nor is it always the transfer of property which furnishes the corresponding stipulation. Thus, a contract for the sale and delivery of unspecified clover-seed, expressly stipulating that bags shall be furnished by the purchaser, imposes upon the latter the condition precedent of furnishing bags within the time fixed for delivery; delivery being the engagement next in order. The seller need not demand the bags; and the fact that the seller had not the seed on hand at any time would not have excused the purchaser from tendering the bags, and discharging a duty which he had bound himself strictly to perform as a prerequisite to the sale and delivery.²

The same strict rule as to conditions precedent will apply wherever by the terms of the bargain, as made by the parties, something essential is to be first done by some third person.

¹ 2 Kent Com. 497; Benj. Sales, bk. 2, c. 3; Bishop v. Shillito, 2 B. & Ald. 329; Shepherd v. Harrison, L. R. 4 Q. B. 196, 493; s. c. L. R. 5 H. L. 116; Strong v. Taylor, 2 Hill, 326; Story Sales, § 250.

² Russell v. Witt, 38 Ind. 9. And see Thompson v. Ray, 46 Ala. 224; Lowry v. Barelli, 21 Ohio St. 324.

Thus, as we have seen, a sale contract, made dependent upon a price to be fixed hereafter by valuers, will render it essential that the valuers act before the bargain can be pronounced a valid one.¹ So would it be with a sale of goods subject to the inspection or approval of some person mutually designated by buyer and seller; and such a condition precedent must be complied with before the property in the chattels can vest in the buyer.² And, again, where payment is to depend upon the measurement or computation of a certain expert, or a third party's certificate, or the stipulation is for payment into the hands of a designated depository, or in some specified manner, — in all such cases, if the stipulation be really put by way of a prerequisite, the party who claims must show performance of the condition, in accordance with the mutual understanding.³ The refusal of such third party to undertake the responsibility which buyer and seller have sought to put upon him, simply leaves the sale parties without a bargain; for even if he accepts the trust, and then fails to perform it, the question is merely one of remedies, to be pursued against him for obstructing the sale.⁴ And if, to avoid such a predicament, the sale contract leaves a chance for substitution in case the designated party refuses to act, — as in a sale made expressly "subject to the inspection of A., or other mutually satisfactory," — neither contracting party has the right to call for the substitute until A. has refused or neglected to act.⁵

But to conditions contained in a sale contract the usual

¹ *Supra*, p. 199; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Nutting v. Dickinson*, 8 Allen, 540; *Hutton v. Pearce*, 26 Ark. 382.

² *Brogden v. Marriott*, 2 Bing. N. C. 473; *Thurnell v. Balbirnie*, 2 M. & W. 786; *Benj. Sales*, bk. 4, pt. 1; *Dustan v. McAndrew*, 44 N. Y. 72.

³ *Mills v. Bayley*, 2 H. & C. 36; *Roberts v. Watkins*, 18 C. B. n. s. 278; *Thompson v. Ray*, 46 Ala. 224. See *Newlan v. Dunham*, 60 Ill. 233.

⁴ *Jenkins v. Beetham*, 15 C. B. 189; *Thompson v. Ray*, 46 Ala. 224.

⁵ *Dustan v. McAndrew*, 44 N. Y. 72. The fact that A. was one of the sellers was here held to be immaterial to the issue.

exceptions as to waiver and impossibility apply. A party who on his part has waived or prevented performance must respond to the other, notwithstanding. Thus, as already shown, a buyer who has rendered the stipulated valuation impossible by consuming the chattel renders himself liable on a *quantum valebat*, to be fixed by a jury.¹ That there may be a mutual waiver of the condition cannot be doubted. So conduct which renders performance of the condition impossible constitutes an exception. But impossibility of performance caused by the opposite party is an excuse not to be lightly accepted. Thus, in *Smoot v. United States*, the Supreme Court of the United States decided against a government contractor, on the ground that he was not justified in throwing up his contract and claiming damages as for refusal on the part of the government to be bound by its agreement. The contract was for horses, to be delivered subject to a certain kind of inspection on the part of government officers. New rules were promulgated pending a performance, requiring a more stringent inspection to be applied to contracts of this character; but the contractor, instead of tendering horses to be inspected in the manner previously agreed upon, abandoned the contract altogether on ascertaining the new rules, neither buying nor delivering, but relying upon his suit for damages. It was decided that he could recover nothing.² This decision does not go to sustain the government in making such arbitrary changes: most probably, had the inspecting officers insisted on the new rules to the extent of declining the acceptance of horses tendered under the contract, or of clearly and unequivocally refusing to perform their part of the bargain, the contractor would have won his suit; but his error lay in presuming too readily that the contract was broken, and so failing to

¹ See *Clarke v. Westroppe*, 18 C. B. 765; *supra*, p. 200. See also *Batterbury v. Vyse*, 2 H. & C. 42.

² *Smoot v. United States*, 15 Wall. 36.

do what was first in order ; namely, to procure and bring forward horses for inspection, a plain condition precedent to which he had bound himself.

Impossibility of performance, owing to circumstances which impute no fault to the opposite party, affords an excuse for performance within the same narrow and uncertain range marked out for other contracts.¹ Actual impossibility to perform, which arises from extraneous circumstances of inability merely, and does not amount to physical impossibility, — such as the want of money to make a stipulated payment, or the failure to find in the market what was to be delivered, — cannot excuse one from the legal obligation to perform the condition. Of this a curious instance is seen in the old English case, which held a foolish buyer to his bargain, made in ignorance of the rule of arithmetical progression, whereby he had bound himself to pay a preposterous price for a horse by doubling for every consecutive nail found in the hoofs ; though it may be doubted whether justice would at this day push a practical joke so far as to ruin its victim, if fraud or a want of clear *aggregatio mentium* on the price could be set up to defeat the claims of the outwitting party.² So the happening of a contingency which, from the nature of the transaction, the party binding himself ought to have expressly guarded against, does not relieve him from the legal liability to perform, though actual performance prove clearly out of the question.³ Legal impossibility, occasioned by the passage of a statute rendering the act illegal, will by the courts of the country be deemed a sufficient excuse for non-performance ; and this in furtherance of the local public policy.⁴ But it is not easy to trace the limits of this doctrine further. Our

¹ *Supra*, pp. 278–281.

² *James v. Morgan*, 1 Lev. 111; *Thornburn v. Whitacre*, 2 Ld. Raym. 1164. And see *Gilpins v. Consequa*, 1 Pet. C. C. 91.

³ *Kearon v. Pearson*, 7 H. & N. 386.

⁴ *Benj. Sales*, bk. 4, pt. 1; *Baily v. De Crespigny*, L. R. 4 Q. B. 180.

modern law, to judge from many of the decisions, is less punctilious in respect of impossibility as an excuse for not fulfilling bargains than that of former days;¹ and yet, while the obligor has been relieved in several instances on the ground that performance had become physically impossible by the act of God, there are other cases which clearly refuse to recognize so sweeping a cause of exemption.² The death of a particular horse, the subject of sale and delivery on a future day, or the spoliation of a specific growing crop from natural causes before the time of gathering it, is held to relieve the seller from performance of the promise to deliver.³ But the destruction by fire of an unfinished chattel which is being made to order certainly does not exempt the maker from his obligation to deliver.⁴ It would appear that between the engagement to perform a condition precedent as to a specific and identified thing, and an engagement to procure something as yet unspecified and unappropriated to fill an order, there is a wide difference of decision; impossibility of performance being indulged as an excuse in the former rather than in the latter instance. Yet, after all, the underlying principle of the exception is found in the presumed mutual understanding of the parties to the bargain; and to execute an implied intention, a rational purpose with reference to the stipulation, under the circumstances which rendered performance impossible, is the true solution of the difficulty.⁵

Even as thus stated, the rule is found quite capricious for practical application. Two late New York cases may serve

¹ For instance, cf. *Barker v. Hodgson*, 3 M. & S. 267, with *Ford v. Cotesworth*, L. R. 7 Q. B. 127, *Kearon v. Pearson*, 7 H. & N. 386, and *Taylor v. Caldwell*, 3 B. & S. 826.

² *Shep. Touch.* 173; *Benj. Sales*, bk. 4, pt. 1; *Mill Dam Foundry v. Hovey*, 21 Pick. 441; *Harmouy v. Bingham*, 2 Kern. 106.

³ *Shep. Touch.* 173; *Howell v. Coupland*, L. R. 9 Q. B. 462.

⁴ *Jones v. St. John's College*, L. R. 6 Q. B. 115; *School District v. Dauchy*, 25 Conn. 530.

⁵ See *supra*, p. 280; *Taylor v. Caldwell*, 3 B. & S. 826.

as an illustration ; in both of which the decision was placed on sound general principles, but the state of facts, as many would suppose, hardly warranted a difference in legal conclusion. The former is *Dexter v. Norton*, where the contract was for the sale and delivery of six hundred and seven bales of cotton, to be paid for on delivery. Four hundred and sixty bales were delivered ; and the remainder were accidentally destroyed by fire without fault or negligence on the vendor's part, so that delivery became impossible. The court held that the seller was not liable to the buyer for non-delivery of the burnt bales ; that impossibility of performance was a valid excuse.¹ Here it appeared that each bale was designated by a particular mark, so that the sale was really one of specific chattels, and not of chattels awaiting appropriation when the fire occurred. This decision was rendered in 1871 by the Court of Appeals. The latter case is *Bigler v. Hall*, decided about two years later by the Commission of Appeals (a sort of auxiliary tribunal of last resort), and apparently without any knowledge of the foregoing precedent. Here the seller had contracted to deliver to the buyer certain logs lying at specified places, all of which were duly measured, appropriated to the contract, and paid for. But, before the logs were rafted, a portion was swept away by a sudden freshet, and lost without fault or negligence of the seller. In a suit brought by the buyer to recover the price paid for the lost logs, it was ruled that impossibility of performance was no excuse ; that the contract to deliver bound the seller absolutely, and that, for non-delivery, he was liable in damages as for breach of a condition. This was a sale of specific chattels as before ; and the only important distinction between the two cases appears to be, that here the price had

¹ *Dexter v. Norton*, 47 N. Y. 62, decided by a majority of the court : four judges against two, who silently dissented.

² *Bigler v. Hall*, 54 N. Y. 167, one judge dissenting. Cf. *Logan v. Le Mesurier*, 6 Moore P. C. 116; *Gilmour v. Supple*, 11 Moore P. C. 551.

been paid in advance,—a fact which might have been deemed important of itself in determining the mutual intent of the parties concerning the risk of loss pending delivery of the chattels, but to which no particular attention was paid by the court.

Stipulations as to the time of performance under a contract of sale are sometimes, but not invariably, in the nature of conditions precedent; and the main question presented for determination in controversies of this sort is, whether time appears to have been fairly understood between the parties as an essential element in the performance of the contract. To deliver the chattel, or have it ready at the precise time fixed, would be, under certain circumstances, the gist of the transaction; as, for instance, where a fast boat is ordered in ample season, and with special reference, as both parties know, for competition at a particular race. But, on the other hand, and under the ordinary circumstances attending sale contracts, a party who promises to forward merchandise by a certain time, and without any notice from the buyer of peculiar reasons which necessitate prompt performance, may well be supposed to stipulate for reasonable punctuality, rather than an exact and literal fulfilment of his promise; and the prevailing rule is to punish, if need be, only to the extent of rendering the breach of diligent performance, with respect to time, a cause of action for damages sustained by the buyer, like other independent stipulations on the seller's part, and not an occasion for justifying the buyer in rescinding the contract *in toto*, on the ground that a condition precedent had failed.¹ On this point the case of *Hoare v. Rennie*, where a court justified the buyer in not accepting, on the assumption that the seller's stipulation to deliver six hundred and sixty-seven tons of iron,

¹ *Jonassohn v. Young*, 4 B. & S. 296; *Simpson v. Crippin*, L. R. 8 Q. B. 14; *Benj. Sales*, bk. 4, pt. 1; *Rogers v. Woodruff*, 23 Ohio St. 632; *Story Sales*, § 310.

to be shipped "in about equal portions," in each of four consecutive months, was a condition precedent, broken by his failure to ship more than twenty-one tons in June, is questioned by the later authorities.¹ Even where a stringent performance is rightfully exacted under the terms of the contract, acceptance, or a waiver of the condition precedent, might often be inferred from the buyer's subsequent conduct.

Similar considerations should apply to stipulations concerning the place of performance. Thus, a contract to sell cotton at a given price to arrive at L., per ships from C., provided "the cotton *to be taken from the quay* ; customary allowances of tare and draft ; and the invoice to be dated from date of delivery of last bale." It was held that this clause as to place of delivery was not a condition precedent against the sellers, but a stipulation in their favor ; and that the contract in effect placed the cotton at the buyer's risk and charge from the time of landing on the quay.² Yet a stipulation as to the place of performance is, under proper circumstances, to be treated as a condition precedent.³

Sales are sometimes made "upon notice," or with reference to a designated time, or the happening of some event, upon notice of which an act is to be performed. Whose duty, then, is it to first take notice that the time has come, or the event happened ? This must be answered by reference to the contract. The general rule is, that one who binds himself to do a thing at a designated time, or on the occurrence of a particular event, must take notice at his peril, and perform his promise when the time comes or the event

¹ Hoare v. Rennie, 5 H. & N. 19, doubted in Simpson v. Crippin, *supra*. See Rouse v. Lewis, 4 Abb. N. Y. App. 121, where, upon facts showing aggravated delay after payment in advance, it was held that the buyer need not receive the goods.

² Neill v. Whitworth, L. R. 1 C. P. 684.

³ Thompson v. Ray, 46 Ala. 224.

occurs. If, then, the sale be conditioned upon a delivery next Christmas, or (both parties residing in this country) supposing war shall be declared between France and Germany, the buyer and seller are presumed to have equal opportunity of ascertaining when the condition precedent must be performed; and here the party who has engaged to perform the precedent act (or, in such instances, the seller) must perform without awaiting notice from the other that it is time. Still more is he bound to take notice, without a previous intimation from the party with whom he has contracted, whenever the fact upon which the contract turns lies peculiarly within his own knowledge and privity. But if, instead, the other party, according to a just interpretation of the contract as they meant it, was bound to give notice when the time had arrived or the event happened, the giving of such notice becomes the real condition precedent of the contract to which other acts like delivery are postponed. When actual knowledge of the essential fact is peculiarly in the obligee's breast, and particularly where the obligee reserves to himself the control of the fact, so that the exigency for performance shall occur when he so chooses, and not before, he is bound to give notice of the fact before he can compel the obligor to perform his engagement.¹ It may be added, that if a seller agrees to deliver, or a buyer to take away "on demand," or notice from the other party, a reasonable time should be allowed him after such demand or notice for performing his engagement.²

Where a contract for the delivery of chattels of a certain description from time to time does not bind to any fixed limit, it is left optional with either party to put an end to the agreement; but the party seeking to terminate should give notice

¹ *Benj. Sales*, bk. 4, pt. 1; *Haule v. Hemyng*, 6 M. & W. 454; *Vyse v. Wakefield*, 6 M. & W. 442; *Watson v. Walker*, 23 N. H. 471; *Haines v. Tucker*, 50 N. H. 307; *Quarles v. George*, 23 Pick. 400.

² *Ib.*

to the other of his intention in the premises, in order to effect this purpose.¹

The nicety with which this burden of giving notice is adjusted by the courts is pointedly shown by Mr. Benjamin. *Haule v. Hemyng* held that one who had sold a certain lot of barley, to be paid for *at as much as he should sell for to any other man*, could not sue the buyer before giving him notice of the price at which he had sold to others; the reason being, that the persons to whom the buyer might sell were perfectly indefinite and at his own option.² "But no notice is necessary," adds Mr. Benjamin, "where the particular person whose action is made a condition of the bargain is named," — as if in *Haule v. Hemyng* the bargain had been, that the buyer would pay as much as the seller should get from a certain party, J. S.; for here the party bound to pay in this event is sufficiently notified by the terms of his contract that a sale is or will be made to J. S., and agrees to take notice of it: there is a particular individual specified, and the seller is to exercise no option.³ Notice of one kind or another is required in various other cases which may arise under the law of sales, according as an option going to the essence of the contract is given to buyer or seller; but the same general principle applies to the whole subject.⁴

The law of conditions precedent and concurrent is constantly invoked for determining the reciprocal rights of buyer and seller in sales made on the condition of paying or securing the price. We have seen that the transfer of property may, under suitable circumstances, be presumed

¹ *Houston, &c. R. Co. v. Mitchell*, 38 Tex. 85.

² *Haule v. Hemyng*, cited in *Vyse v. Wakefield*, 6 M. & W. 454; Vin. Abr. Condition, A. d. pl. 15.

³ *Ib.*; Benj. Sales, bk. 4, pt. 1.

⁴ See, e.g., sales "to arrive," *infra*; *Kirkpatrick v. Alexander*, 44 Ind. 595.

to have been completed, on the striking of a bargain for specific goods, before either payment or delivery; this being the modern law of England, which, even before actual delivery, casts the risks of title upon the purchaser, though he cannot take the chattel away without paying for it.¹ But, as we have also shown, the circumstances of the transaction may be such as to indicate that the seller agrees to transfer the property in consideration, not of the buyer's engaging to pay, but of his actually paying or securing the price.² Now, in this last very common instance of a sale for payment on delivery, each party is bound to the other by concurrent condition, — the seller to deliver, the buyer to pay, — and neither can sue the other for breach of contract without averring that he performed, or offered to perform, the condition on his part.³

Independently, however, of the question who owns the goods, it is a general rule in all executory agreements for the sale of chattels, that the seller's obligation to deliver, and the buyer's obligation to pay or render equivalent, are concurrent conditions in the nature of conditions precedent, and that performance, or the offer to perform, or a readiness and willingness to do what he was prevented from doing, is a prerequisite on the part of him who would enforce the contract against the other.⁴ Thus, in *Atkinson v. Smith*, there was a sort of exchange bargain, or what would now be styled a mutual agreement for cross-sales; A. engaging to buy of B. a lot of fleeces, and to take in return a lot of woollen cloths called noils, and B. making corresponding engagements. The noils rose in price, and B. refused to deliver them. A. sued,

¹ *Supra*, p. 227; Blackb. Sales, 147-149; Benj. Sales, bk. 2, c. 2.

² *Ib.*

³ Benj. Sales, bk. 4, pt. 1; *Rawson v. Johnson*, 1 East, 203; *Jackson v. Allaway*, 6 M. & G. 942.

⁴ *Ib.*; *Dana v. King*, 2 Pick. 155; *Williams v. Healey*, 3 Denio, 363; *Warren v. Wheeler*, 21 Me. 484; *Atkinson v. Smith*, 14 M. & W. 695; *Withers v. Reynolds*, 2 B. & Ad. 882; *Sutton v. Campbell*, 2 Thomp. & C. (N. Y. Supr.) 595.

averring independent agreements; but he was nonsuited, the judges holding that he should have alleged his offer to deliver the fleeces, which was a condition precedent to his right to claim the noils.¹ But in *Bishop v. Shillito*, where iron was delivered under a contract that certain bills outstanding against the seller should be taken out of circulation, which was not done, the seller was allowed to sue in trover, and recover what he had delivered; for such delivery of the iron was to have been contemporaneous with the redelivery of the bills.²

The principle here involved is constantly applied, in the American authorities, so as to defeat the buyer's title as owner where goods have been delivered on an express or implied condition that the seller shall not be divested of his property right therein until the stipulated price is paid or secured. Thus, Chancellor Kent lays it down emphatically, that, where there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the purchaser on delivery until he performs the condition, or the seller waives it; and the right continues in the vendor, even against creditors and subsequent purchasers of the vendee.³ And accordingly it is well settled, that where goods are sold and delivered on condition that the property therein shall not vest in the buyer until the purchase-money is paid or secured, such payment or adjustment of the purchase-money is a condition precedent on the buyer's part to the transfer of title to himself from the seller, subject, of course, to the usual exception attending the performance of a condition precedent.⁴

¹ *Atkinson v. Smith*, 14 M. & W. 695.

² *Bishop v. Shillito*, 2 B. & Ald. 329.

³ 2 Kent Com. 497. See *Green v. Rowland*, 16 Gray, 58.

⁴ *Bishop v. Shillito*, 2 B. & Ald. 329, *n.*; *Godts v. Rose*, 17 C. B. 229; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Benj. Sales*, bk. 2, c. 3; *Porter v. Pettengill*, 12 N. H. 299; *Whitney v. Eaton*, 15 Gray, 225; *Tyler v. Freeman*, 3 Cush. 261; *Story Sales*, § 313; *Morris v. Rexford*, 18 N. Y. 552;

Thus, if a tradesman sells goods payable on delivery, and his servant by mistake delivers without receiving the money, he may, after a demand and refusal to re-deliver or pay, sue in trover for the goods.¹ The consignment of a piano, too, by a wholesale to a retail dealer, on the previous distinct understanding that the piano shall remain the property of the consignor until paid for, and, if sold, that the consignee's agreement with the purchaser shall expressly reserve the consignor's right in like manner, leaves the consignor's title such that it cannot be seized and sold in execution upon a judgment recovered against the consignee.² Wherever, indeed, the sale is for immediate payment, and the buyer, on getting the goods into his own possession, refuses to make the payment, the seller may reclaim them, notwithstanding delivery.³

What has already been said of the seller's reservation of the *jus disponendi* bears in this same direction.⁴ But, if the sale be conditioned on payment, the seller's right is usually conceded to extend even further. He may actually deliver the chattel to the buyer,—an act which, under circumstances imputing to him no *laches*, no waiver of a stipulated right, will not debar him from pursuing legal remedies afterwards; and the situation of things may be such as even to permit of leaving the chattel in the buyer's hands for a considerable period, in expectation of payment, without the loss of the seller's title. A liberal disposition is shown by the courts here, as in the case of a seller's reservation of the *jus*

Hasbrouck v. Lounsbury, 26 N. Y. 598; Little v. Page, 44 Mis. 412; Ridgeway v. Kennedy, 52 Mis. 24; Duncans v. Stone, 45 Vt. 118; Thompson v. Ray, 46 Ala. 224; Paul v. Reed, 52 N. H. 136; Henderson v. Lauck, 21 Penn. St. 359; Shireman v. Jackson, 14 Ind. 459; Forbes v. Marsh, 15 Conn. 384; Clark v. Wells, 45 Vt. 4; Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 311; Fifield v. Elmer, 25 Mich. 48.

¹ Bayley, J., in Bishop v. Shillito, *supra*.

² Cole v. Mann, 3 Thomp. & C. (N. Y. Supr.) 380.

³ Morris v. Rexford, 18 N. Y. 552.

⁴ *Supra*, c. 4.

disponendi, in order that acts which merely indicate the reposing of confidence in the buyer, especially in mere externals, shall not prejudice the rights of the seller.¹ Thus, where delivery was made in expectation of a draft which the buyer was to go to the bank and procure, and the seller was put off with the promise that the draft would be sent him at once, it was held that the condition still remained in force to prevent the transfer of title.²

Even though the goods be in possession of a warehouseman or other custodian, no transfer of title, as against the seller, is effected by the custodian's entry of transfer on his books at the seller's suggestion; such third party, as part of the transaction, giving a paper to that effect to the seller, which the latter presents to the buyer, to be handed to him only on receiving payment: for here the intention is, upon the whole, manifested that the seller is not to part with the goods until they are paid for. This case is quite unlike that where a buyer takes a delivery order to the custodian, and the latter attorns to him.³

The rule which insists upon the performance of a condition precedent applies not to cash sales alone; for, wherever delivery is made upon express or implied condition that the title shall remain in the seller until the price is adjusted after a certain manner, the buyer's possession, being in strict accordance with the condition, carries with it no absolute right of ownership. Thus, where goods are sold on six months, in consideration of certain acceptances, balance in sixty days,

¹ *Gibson v. Tobey*, 46 N. Y. 637; *Tyler v. Freeman*, 3 Cush. 261; *Sage v. Sleutz*, 23 Ohio St. 1; *Johnston v. Eicheberger*, 13 Fla. 230; *Stone v. Perry*, 60 Me. 48; *post*, as to waiver. In *Shepherd v. Harrison*, L. R. 4 Q. B. 196, 493, s. c. L. R. 5 H. L. 116, this principle is applied in a case of reservation of *jus disponendi*, — the seller having mailed the bill of lading, together with the bill of exchange, directly to the buyer. And see *Godts v. Rose*, 17 C. B. 229.

² *Gibson v. Tobey*, 46 N. Y. 637.

³ *Godts v. Rose*, 17 C. B. 229; *Dixon v. Yates*, 5 B. & Ad. 313.

the due transfer of acceptances to this effect is a prerequisite of title to the goods in the buyer;¹ and, delivery being made upon the stipulation that the buyer shall give his notes for the price, with or without indorsement, or that he shall furnish certain securities, no title passes to the buyer before full performance of the condition.² So, too, where goods are sold at a fixed price, to be paid at a certain future time, and delivered upon this condition, the buyer acquires no title until he has made the payment.³ Sometimes other conditions besides payment, or adjusting the price, accompany delivery.⁴ Nor are the instances rare where possession, given under the general condition that no property in the chattel shall pass until it is fully paid for, is held not to preclude the paramount title of the original *bona fide* seller.⁵ A chattel may also be delivered with such a condition as to title by sale, while meantime the purchaser is to use it by way of loan or hire, under the mutual agreement of the parties.⁶

If the contract of the parties be such as to indicate that the seller shall retain his right of ownership in the chattel after delivery, notwithstanding a partial payment or partial adjustment of the price, the condition of payment is enforceable to the extent of rendering full adjustment a prerequisite of title acquisition in the buyer. Instances are found where

¹ *Dresser Man. Co. v. Waterston*, 3 Met. 9.

² *Russell v. Minor*, 22 Wend. 659; *Hirschorn v. Canney*, 98 Mass. 149; *Stone v. Perry*, 60 Me. 48.

³ *Little v. Page*, 44 Mis. 412; *Whitney v. Eaton*, 15 Gray, 225; *Hasbrouck v. Lounsbury*, 26 N. Y. 598; *Fifield v. Elmer*, 25 Mich. 48; *Clark v. Wells*, 45 Vt. 4.

⁴ *Hill v. McKenzie*, 3 Thomp. & C. (N. Y. Supr.) 122; *Dresser Man. Co. v. Waterston*, 3 Met. 9; *Dyer v. Libby*, 61 Me. 45. And see *Allen v. Delano*, 55 Me. 113; *Buckmaster v. Smith*, 22 Vt. 113.

⁵ *Sage v. Sleutz*, 23 Ohio St. 1; *Deshon v. Bigelow*, 8 Gray, 159; *Cole v. Mann*, 3 Thomp. & C. (N. Y. Supr.) 380; *Powell v. Preston*, 3 Thomp. & C. (N. Y. Supr.) 644.

⁶ *Forbes v. Marsh*, 15 Conn. 384; *Shireman v. Jackson*, 14 Ind. 459. So, too, as to sales on the instalment plan, *infra*, p. 296.

chattels are sold payable in instalments, — a plan which is becoming popular, in parts of this country, with reference to sewing-machines, pianos, and the like.¹ Prudence requires that contracts of this uncertain description be reduced to writing, so as to show clearly the respective rights of the parties, and enable the courts to discriminate between a sale conditional upon payment by instalments and that which is in truth a mortgage transaction.² While, too, a seller may stipulate for the retention in himself of a right of property, which ought naturally to carry with it the right of possession, an actual delivery of possession to the buyer may be so far incompatible with the retention of this right of possession as to render it incumbent upon him to give notice, or make some explicit declaration, before he can retake the goods, and resume possession as of right.³

But, at all events, a seller may resume possession of his chattels conditionally sold, on putting the other party at default. The possession of a purchaser who refuses payment upon getting possession of goods which had been delivered him in pursuance of an understanding, express or implied, that payment and delivery should be simultaneous, is wrongful; and the seller may reclaim the goods as his own, if reasonably prompt in asserting his rights in the premises.⁴

The condition precedent or concurrent thus imposed by the

¹ *Sage v. Sleutz*, 23 Ohio St. 1; *Sutton v. Campbell*, 2 *Thomp. & C.* (N. Y. Supr.) 595; *Cole v. Mann*, 3 *Thomp. & C.* (N. Y. Supr.) 380; *Preston v. Whitney*, 23 Mich. 260; *Giddey v. Altman*, 27 Mich. 206; *Goldsmith v. Bryant*, 26 Wis. 34.

² See *Rowan v. Union Arms Co.*, 36 Vt. 124.

³ *Giddey v. Altman*, 27 Mich. 206. But see *Powell v. Preston*, 3 *Thomp. & C.* (N. Y. Supr.) 644.

⁴ See *Atkinson v. Smith*, 4 M. & W. 695; *Withers v. Reynolds*, 2 B. & Ad. 882; *Henderson v. Lauck*, 21 Penn. St. 359; *Adams v. O'Conner*, 100 Mass. 515; *Leven v. Smith*, 1 Denio, 571; *Paul v. Reed*, 52 N. H. 136; *Deshon v. Bigelow*, 8 Gray, 159; *Ridgeway v. Kennedy*, 52 Mis. 24.

seller upon delivery will take effect in every *bona fide* transaction against not only the buyer, but all who may claim under him, including his attaching creditors.¹ A recent New Hampshire case may serve as an example, so far as a buyer's creditors are concerned. A man called at a store to make some cash purchases. He bought a hog, and put it into his wagon; also some sugar, which he mixed with sugar of his own in the wagon; also certain other groceries, the prices of which were agreed upon. Then he took out his wallet to pay for the whole; but, before he could deliver the money, a writ was served upon him. It was decided by the court, that, upon this state of facts, the sale, as it was conditioned upon a payment not yet made, was incomplete, and that the seller could reclaim the goods as his own.² Since the delivery of chattels to the buyer conditional upon payment carries no attachable interest therein of which his creditors can avail themselves, it follows, under the ordinary rule of law, that the seller's title is not extinguished by any tender of the purchase-money made on the attaching creditor's behalf;³ a consequence which is, however, averted by legislation in some of our States, which permits the attaching creditor to make payment or tender within a fixed period, and so take the buyer's place with reference to the property.⁴

But a hardship is discovered when we come to apply the rule to sub-purchasers from the original buyer of chattels delivered into his possession. Any seller who makes his title known to such parties in anticipation of a sub-purchase may justly claim the law's protection.⁵ But how stands the case

¹ *Forbes v. Marsh*, 15 Conn. 384; *Paul v. Reed*, 52 N. H. 136; *Ridgeway v. Kennedy*, 52 Mis. 24; *Ballard v. Burgett*, 40 N. Y. 314; *Bigelow, C. J.*, in *Coggill v. Hartford, &c. R. R. Co.*, 3 Gray, 515; *Sage v. Sleutz*, 23 Ohio St. 1; *Duncans v. Stone*, 45 Vt. 118; *Stone v. Perry*, 60 Me. 48.

² *Paul v. Reed*, 52 N. H. 136.

³ *Sage v. Sleutz*, 23 Ohio St. 1; *Buckmaster v. Smith*, 22 Vt. 203.

⁴ *Duncans v. Stone*, 45 Vt. 118.

⁵ See *Dresser Man. Co. v. Waterston*, 3 Met. 9.

as against a *bona fide* sub-purchaser who buys without notice of the original seller's claim of ownership, or of the condition upon which delivery was first made? Here are goods offered for sale by one rightfully in possession: they are taken and paid for by another in the honest belief that the transaction was legitimate; and the sub-purchaser may invoke the aid of an old maxim, that, where one of two innocent parties must suffer, he should bear the loss whose conduct occasioned the difficulty. Accordingly, it has been not unfrequently asserted in effect, and we may perhaps regard the rule as settled in some of the United States, that the *bona fide* purchaser from one to whom chattels as yet unpaid for were delivered by the original seller on the understanding that no transfer of title should take place until payment was made, shall nevertheless hold them as his own against the original seller, if the latter's claim of title were not made known to him before his own purchase.¹

Whatever support, however, this last proposition may seem to have received from some of the earlier Massachusetts and New York decisions, must, in the light of other recent adjudications, be considered as withdrawn.² For the weight of American authority is now decidedly opposed to such a doctrine. The arguments on both sides were carefully balanced in the able opinion pronounced by Chief Justice Bigelow of Massachusetts, in *Coggill v. Hartford, &c. R. R. Co.*,—a case which ranks as a leading one on the subject. Adverting to the long-settled rule as to a sale and delivery on condition of payment in cases between buyer and seller, which concedes that the seller has a right to repossess himself of the goods,

¹ *Michigan Central R. R. Co. v. Phillips*, 60 Ill. 190, *per curiam*; *Rose v. Story*, 1 Barr, 190; *Story Sales*, § 313; *Hussey v. Thornton*, 4 Mass. 405; *Wait v. Green*, 36 N. Y. 556; *Leighton v. Stevens*, 19 Me. 154.

² See *Hussey v. Thornton*, 4 Mass. 405, commented on in *Coggill v. Hartford, &c. R. R. Co.*, 3 Gray, 545; *Wait v. Green*, 36 N. Y. 556, explained in *Ballard v. Burgett*, 40 N. Y. 314.

both against the buyer and against his attaching creditors, the Chief Justice proceeds to the defence here set up, that a valid title should vest in the *bona fide* purchaser from the original buyer notwithstanding, since possession was *per se* a badge of fraud. That possession is a badge of fraud, he continues, will not suffice for argument, as compared with the principle that possession alone gives no right to transfer the title: the title continues in the seller until the conditions of sale and delivery are complete.¹ *Ballard v. Burgett*, another leading case, puts the New York doctrine on substantially the same firm footing. Here A. had sold oxen to B., and given him possession, under an agreement that the property should remain vested in A. until B. made payment of the price; but B., before paying the price, sold the oxen to *bona fide* third persons without notice. It was decided, upon full examination of the authorities, that A. could recover the oxen from such third persons on the ground that his title had not passed.² Numerous other American decisions of earlier and later date support the same conclusion; and accordingly we may state, as decidedly the better opinion in this country, that (excepting, perhaps, the case of negotiable instruments) a sale of personal property made by one to whom the chattel was delivered by the original seller on condition that property should not pass until the chattel was paid for, or the price duly adjusted, confers no better title upon a *bona fide* purchaser without notice from the original buyer than the buyer himself had, or his attaching creditors, or a purchaser with actual notice of the condition; that against all of these the original seller may with due diligence follow up his rights, and reclaim the chattel as his own for non-fulfilment of the condition annexed to the delivery.³ For the original buyer,

¹ *Coggill v. Hartford, &c. R. R. Co.*, 3 Gray, 545.

² *Ballard v. Burgett*, 40 N. Y. 314.

³ *Coggill v. Hartford, &c. R. R. Co.*, and *Ballard v. Burgett*, *supra*; *Hart v. Carpenter*, 24 Conn. 427; *Bigelow v. Huntley*, 8 Vt. 151; *Deshon*

having no title in himself, can pass none ; and, as it has been further suggested, any third party who knows that he had come into possession of the goods is bound to inquire whether the title acquired was that of buyer, borrower, or hirer, or in still another capacity.¹

Some qualifications of the rule may still apply on behalf of *bona fide* purchasers. Thus it will be admitted that the relations of the original parties to transactions like these jostle roughly the rights of others, since a buyer may have the opportunity to set up a fictitious credit with third persons, and tempt them to their ruin. Where, therefore, the transfer of possession between parties is merely a dishonest device, with the semblance of a sale, fraud may be alleged ; and fraud, of course, must recoil upon the guilty participants.² But a more obvious qualification grows out of the law of transfer pertaining to negotiable instruments.³ It is perhaps on this latter ground, rather than on any direct dissent to the general doctrine of upholding against the world a seller's title pending fulfilment of a condition precedent to transfer, that we find some decisions lately reported to the point, that a seller who makes over to the buyer a *quasi* negotiable instrument in the nature of a bill of lading, thus vesting the

v. Bigelow, 8 Gray, 159; *Hirschorn v. Canney*, 98 Mass. 149; *Southwestern Freight Co. v. Plant*, 45 Mis. 517; *Ridgeway v. Kennedy*, 52 Mis. 24; *Price v. Jones*, 3 Head, 84; *Baker v. Hall*, 15 Iowa, 277; *Hotchkiss v. Hunt*, 49 Me. 213; *Clark v. Wells*, 45 Vt. 4; *Fifield v. Elmer*, 25 Mich. 48; *Shireman v. Jackson*, 14 Ind. 459.

¹ See *Forbes v. Marsh*, 15 Conn. 384. But cf. *Leighton v. Stevens*, 19 Me. 154, where it is said that in cases of apparent ownership third persons have a right to consider the property as that of the apparent owner; a proposition which is doubtless true, so far as to render it necessary for the original seller who claims adversely to overthrow such presumption as may arise from the first buyer's possession, and show that the condition has not been performed upon which title depended.

² See *Worman v. Kramer*, 73 Penn. St. 378; *infra*, as to fraudulent sales.

³ *Supra*, p. 17; 1 Sch. Pers. Prop. 593.

latter with the *indicia* of ownership, cannot afterwards recover the goods it represents under a claim that the goods were conditionally sold, so as thereby to defeat the title of one who has *bona fide* purchased or advanced on the security of the instrument.¹ The special *animus* of these decisions is to sustain such bills of lading according to their tenor, and protect their use in the community as a suitable basis for merchandise loans. We may add, that a *bona fide* purchaser in this connection is one who advances or parts with property as a consideration: incurring a contingent liability for the first buyer, such as indorsing his notes for the price, is not enough to place a party upon this favored footing.²

But the usual exceptions noted with reference to conditions precedent prevail likewise where goods are sold on condition of paying or securing the price; and acts and conduct on the seller's part, from which a waiver, express or implied, of the condition may be inferred, or which go to render due performance by the buyer impossible, will excuse the buyer from a strict compliance with the condition precedent, besides debarring the seller of the right to reclaim the goods as his own. The title thereto once vesting in the buyer, the unpaid seller's remedies become those of an ordinary creditor; and it is a familiar principle, that they with legal demands against a debtor who first attach will take the precedence. Delivery, we have seen, is not necessarily a waiver of the condition of sale; nor conduct on the seller's part which merely indicates a disposition to repose confidence in the buyer, and carry out the bargain, with all its conditions, in a liberal spirit.³ But delivery is an important circumstance, never-

¹ Michigan Central R. R. Co. v. Phillips, 60 Ill. 190; Western Transportation Co. v. Marshall, 4 Abb. N. Y. App. 575; Rawls v. Deshler, 4 Abb. N. Y. App. 12. But see Brand v. Focht, 1 Abb. N. Y. App. 185; Hirschorn v. Canney, 98 Mass. 149. Local statutes concerning bills of lading sometimes affect the question. Ib.

² Downs v. Belden, 46 Vt. 674.

³ *Supra*, p. 294.

theless; and a voluntary delivery of the goods, or the *indicia* of title, made by the seller, with nothing said about the price, is presumptively a waiver of any possible condition concerning price, so as to render it incumbent upon him, under such circumstances, to show that the condition not only entered into the contract, but was never waived on his part.¹ And to do so successfully, he must have pursued his right with reasonable diligence according to the circumstances; following up the buyer at once, and without intermission, if the condition was cash payment or immediate adjustment of the price on delivery; nor suffering his vigilance to sleep after the maturity of the buyer's obligation, if the allowance of time was a part of the condition. Thus, where goods were to be paid for by the buyer's note, and the seller did not call for it until eight days after the sale, this delay was held to be fatal to his claim of title;² and where it was agreed that the buyer should have possession and pay the price within a fixed period, and, after the time had elapsed, the buyer was still suffered without objection to retain possession, the court inferred assent to further delay and a waiver on the seller's part.³

But each case must be adjudged on its own merits; for although waiver of the condition may be by express or implied acts and conduct, and while negligence unexplained justifies its inference, yet the essence of waiver, as one of our judges has well expressed it, is, after all, "voluntary choice not to claim and not mere negligence."⁴ That the lapse of several days in following up the buyer is not conclusive evidence of a waiver of condition on the seller's part, appears from a case

¹ See *Leighton v. Stevens*, 19 Me. 154; *Farlow v. Ellis*, 15 Gray, 229; *Whitney v. Eaton*, 15 Gray, 225; *Smith v. Lynes*, 1 Seld. 41.

² *Smith v. Dennie*, 6 Pick. 262.

³ *Hutchings v. Munger*, 41 N. Y. 155. And see *Mixer v. Cook*, 31 Me. 340; *Bowen v. Burk*, 13 Penn. St. 146; *Scudder v. Bradbury*, 106 Mass. 427; *Goldsmith v. Bryant*, 26 Wis. 34.

⁴ Shaw, C. J., in *Farlow v. Ellis*, 15 Gray, 229.

where a courtesy in the particular trade of ten days for payment was recognized, so as to enable the seller to replevy the merchandise afterwards from the buyer's creditors.¹ The circumstance that the parties live far apart, or transact business through third parties who have to notify the principals, is also clearly material in the allowance of time.² To ship goods, mailing to the buyer at the same time a bill indicating the terms of payment, or a letter requesting him to transmit payment by cash, check, or time note, as the case may be, is quite consistent with the idea of enforcing the condition, and justifies the seller in awaiting the due response.³ A want of vigilance on the seller's part, permissive acts of negligence, the failure to object to the buyer's retention of possession where such objection would have been called for, all go to weaken his hold upon the goods as his own; but it is rather his relaxation of proper effort under all the circumstances than the absolute lapse of more or less time that excludes his claim of title. Nor should the character of the chattel itself be disregarded; and a delay which might prove fatal in the case of goods easily taken back would be more readily excusable where the removal is necessarily attended with expense, difficulty, and injury to the subject-matter.⁴ Still less readily will the seller be presumed to have intended a waiver, where the buyer's own conduct was such as to obstruct him in the effort to procure an adjustment of the price; as in the case of a sale, for cash on delivery, of goods in package which were found to require cooperage, where the buyer, after agreeing that the seller should send his cooper to do the needful work upon them, prevented the cooper from working on his arrival,

¹ *Stone v. Perry*, 60 Me. 48. But a special usage that no title shall vest before payment should be strictly proved. *Scudder v. Bradbury*, 106 Mass. 422.

² *Stone v. Perry*, 60 Me. 48; *Whitney v. Eaton*, 15 Gray, 225; *Hirschorn v. Canney*, 98 Mass. 149.

³ *Ib.*

⁴ *Goldsmith v. Bryant*, 26 Wis. 34.

and then refused payment of the bill which the seller thereupon sent him.¹

Under suitable circumstances, the original seller would be estopped by his own representations from claiming the goods as his own against a third party who had purchased them in good faith without knowledge of the non-fulfilment of a condition accompanying delivery. But, in a sale upon the condition that the property should remain the seller's until paid for, it has been held that the original seller in a case free from fraud may recover the chattel from a *bona fide* purchaser from the original buyer, notwithstanding, at the time of original sale, the seller had given to the first buyer a receipted bill of parcels, omitting at the latter's request any statement of the condition; and this, too, although the seller told the third party, when he thought of purchasing and inquired as to the sale, that he had sold it to the first buyer: whereupon the third person, having seen the bill of parcels, made the *bona fide* purchase in question.²

Wherever a sale is made, subject to the condition of paying or securing the price on delivery, the buyer is, of course, bound to the performance of the condition on his part: in other words, he should promptly pay, or secure payment, as agreed upon, or at least offer to do so. If the contract be one of sale and delivery for ready money, and the ready money is paid, there is no debt, and the property vests in him forthwith;³ and so long as the buyer is not himself in default, but with due diligence, according to the circumstances, evinces the intention to fulfil his own obligation, so far as may be, his rights will not suffer injury. A tender of the amount due, seasonably and properly made, though refused by the

¹ Hill v. McKenzie, 3 Thomp. & C. (N. Y. Supr.) 122. And see Tyler v. Freeman, 3 Cush. 261.

² Zuchtmann v. Roberts, 109 Mass. 53. See Barnard v. Campbell, 55 N. Y. 456; *supra*, p. 247.

³ Bussey v. Barnett, 9 M. & W. 312.

seller, will of itself discharge all claim of title on the seller's part to the goods already delivered on condition of payment; or, if the goods be not yet delivered, will enable him to sue for the seller's failure to deliver.¹ For the buyer is not bound to keep up a technical continuing tender of the price.² Nor does the buyer's own sale meantime of chattels conditionally held by him on an obligation for payment not yet matured constitute any breach of the condition, or carry with it the forfeiture of his rights; for he would have the right at any time to dispose of his interest in the property, such as it is, though remaining bound to the party from whom he purchased.³

The question whether a particular sale was one for cash on delivery or not, depends—like any other issue of “condition” or “no condition”—upon the intent of the parties at the time of sale, as manifested by their acts and conduct and the surrounding circumstances. The later English authorities seem to incline against the presumption of what were anciently known as “ready-money” sales,—this, however, as is most probable, out of special regard to the character of large mercantile transactions, which, indeed, constitute the great staple of their modern sales decisions; whereas, in this country certainly, and as between retail dealers and their casual customers in particular, the presumption is more decidedly in favor of cash sales,—the payment or adjustment of price as a condition precedent to the transfer of property.⁴ It is frequently held by American courts, that, where nothing is expressly said at the time of the bargain as to terms of payment, the presumption will be that the sale was intended for cash on

¹ *Hutchings v. Munger*, 41 N. Y. 155; *Day v. Bassett*, 102 Mass. 445; *Phillips v. Williams*, 39 Ga. 597; *Story Sales*, § 238.

² *Ib.*

³ *Day v. Bassett*, 102 Mass. 445.

⁴ *Supra*, p. 229; *Blackb. Sales*, 147-149; *Hanson v. Meyer*, 6 East, 614; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Hammett v. Linneman*, 48 N. Y. 399.

delivery.¹ But upon this subject no inflexible rule can be set forth ; for so much depends upon the usual course of dealing between the parties, and on trade usage at the time and place, that, after all, mutual intention must prevail, wherever it can be ascertained. In an age of simple traffic, and among primitive people, cash sales are the rule ; for credit is the outgrowth of confidence and mercantile activity.² To this extent, however, will every sale be presumed a conditional one upon payment (whatever might appear to be the case as to transfer of property), that the seller, without clear evidence that the sale was upon credit, shall not be compelled to relinquish possession to the buyer until he gets his price.³

Performance of the mutual or concurrent conditions of payment and delivery is a simple matter, where a single delivery and a single adjustment of price are contemplated. But where the contract permits of a number of partial acts on either side, it becomes important to determine when one condition precedent is so far performed as to entitle the party to demand performance of the corresponding condition. This problem, too, resolves itself into a question of intention ; whether, for instance, delivery of the whole lot was the prerequisite of payment, or the delivery of a portion entitled the seller to a full or partial payment, under the mutual understanding of the parties. A contract of sale of ten thousand bushels of barley, to be delivered at the rate of one thousand bushels per week, which is silent as to the time of payment, is held to import payment upon delivery of the whole ten thousand bushels, and not sooner.⁴ Wherever there is an

¹ *Metz v. Albrecht*, 52 Ill. 491; *Brehen v. O'Donnell*, 34 N. J. L. 408; *Farlow v. Ellis*, 15 Gray, 229; *Cassell v. Backrack*, 42 Miss. 56; *Darnell v. Griffin*, 46 Ala. 520. But see *Jenkins v. Jarrett*, 70 N. C. 255.

² See *Southwestern Freight Co. v. Plant*, 45 Mis. 517; *Goldsmith v. Bryant*, 26 Wis. 34.

³ See *Bloxam v. Sanders*, 4 B. & C. 941; *post*, c. 7.

⁴ *Metz v. Albrecht*, 52 Ill. 491.

entire contract, the condition precedent imposed by law upon the seller of delivering the whole quantity is not affected by the circumstance that the buyer has not paid for the portion already delivered.¹ The same holds true where their agreement is explicit in postponing payment to the delivery of the last load or parcel.² So, on the other hand, where the buyer is to come and take away the chattels from the seller's premises, and the contract was silent as to the time of payment, he is bound to pay at once and in full, and not as fast as he removes the lot by piecemeal.³ For the entirety of a contract depends upon the intention of the parties, and not upon the divisibility of the subject-matter; though it is manifest that parties who do not like to trust one another are quite at liberty to bargain for payment by instalments correspondent with part-delivery, and so break up into fractional parts what would otherwise have been an entire sale contract.⁴ A partial delivery, conditioned upon receiving full payment after the whole lot is delivered, gives the buyer no title in the portion delivered against the seller's consent.⁵

Accepting partial performance under an entire contract is sometimes treated, under the circumstances, as an assent on the obligee's part to delay, and a waiver of forfeiture. Thus, if the price for chattels sold and delivered is wholly due at a certain time, and the seller accepts part-payment, and still allows the buyer to retain possession, this act so far changes the original *status* of the parties, that the buyer is presumed to have a right to acquire title by paying the residue of the purchase-money; which right will continue until there is a

¹ *Ib.*; *Mount v. Lyon*, 49 N. Y. 552; *Shinn v. Bodine*, 60 Penn. St. 182.

² *Henderson v. Lauck*, 21 Penn. St. 359.

³ *Brehen v. O'Donnell*, 34 N. J. L. 408.

⁴ See *Withers v. Reynolds*, 2 B. & Ad. 882; *Hyde v. Lathrop*, 2 Abb. N. Y. App. 436; *Bankart v. Bowers*, L. R. 1 C. P. 484.

⁵ *Wanamaker v. Yerkes*, 70 Penn. St. 443.

demand for the residue, followed by refusal.¹ But a buyer cannot sue for the non-delivery of a chattel under an entire contract, where he has only paid or offered to pay a part of the consideration; even though the part paid includes the full money consideration, and another chattel was agreed to be taken by way of balancing the price; the seller having waived none of his rights under the contract.²

Stipulations concerning price have sometimes the effect of passing property to the buyer, subject to possible defeasance by way of condition subsequent; as in the case of a sale providing that, upon the purchaser's failure to pay over to the seller the first money received on their sub-sale, the chattels should be subject to the seller's order.³ Where one received sheep upon his undertaking to deliver a part of the wool annually, and pay for the sheep at the end of four years, and the further agreement of the parties, that, if the annual amount of wool were not delivered, the whole price, as well as the wool, should become due, it was held — the sheep dying early in the term — that the title had passed to the purchaser, that the sheep were at his risk, and that the whole price was due.⁴ So, too, it may be mutually agreed that the property shall vest primarily, not in the buyer, but in some third party; a convenient method of securing those who have become sureties or indorsers for the buyer, until final payment of the price on maturity of the obligation.⁵ There are other instances where the co-operation of a third person is, from the nature of the case, needful, before the buyer can acquire title in the goods sold to him.⁶

Sales "on trial" or "on approval," as they are termed,

¹ *Hutchings v. Munger*, 41 N. Y. 155.

² *Sutton v. Campbell*, 2 Thomp. & C. (N. Y. Supr.) 595.

³ *Chamberlain v. Dickey*, 31 Wis. 68.

⁴ *Smith v. Dallas*, 35 Ind. 255.

⁵ *Worthy v. Cole*, 69 N. C. 157; *Sheffer v. Montgomery*, 65 Penn. St. 329.

⁶ See *Perkins v. Dacon*, 13 Mich. 81.

also afford instances of condition precedent; to which may be added the bargain of "sale or return." It is obvious that one may take a chattel on the understanding that he is to try it before the purchase shall take full effect; or, again, upon a complete present bargain, with the reservation of a right on the buyer's part to return it within some period: and the main object of either provision is to give the buyer a chance to test the qualities of the thing, and find it satisfactory, before he shall be finally bound to the bargain. But the concession thus made by the seller is not coextensive in the two cases; for the one puts the test as a condition precedent to divesting the seller fully of his property, while the other seems rather to carry property to the buyer, defeasible on the condition subsequent of a test which proves unsatisfactory; though this application of a test must be, after all, a matter often within the buyer's breast, and a sort of ill-defined ingredient in determining his satisfaction or dissatisfaction.

The point towards which these decisions gravitate is doubtless that of mutual intention; but — using the terms above stated in no technical sense, since common-sense men will every day make bargains of either character, without designating them by any particular name — we find the distinction quite marked, as regards the immediate passing of property, between sales "on trial," "on approval," and the like, and the bargain of "sale or return." There is a buyer's option, to be sure; but, as it has been fitly said, an option to purchase if the buyer likes is essentially different from an option to return a purchase if he should not like. In one case, the property will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return.¹

In sales "on trial," then, the buyer's option embraces the

¹ Wells, J., in *Hunt v. Wyman*, 100 Mass. 198. And see *Benj. Sales*, bk. 4, pt. 1; *Story Sales*, §§ 128, 247, 250.

full period agreed upon, but no more ; and, where this period has not been expressly fixed in advance, a reasonable time is implied. The duty here rests, after delivery, upon the buyer who disapproves, of making his disapproval known to the seller, and acting upon it, in due season ; for, upon lapse of the time agreed upon, the property will vest in him, and the sale become absolute, unless he has taken the initiative by returning the chattels in token of his dissatisfaction.¹ Though the seller lives at a distance, the buyer is bound to seek him.² But, during the full period agreed upon for trial, the buyer, it seems, is at liberty to change his mind ; nor is his right of choice lost by telling the seller, in the interval, that the price does not suit him, provided he still retains possession of the chattel ;³ though whether one could make his decision known, and then reverse it on the plea that a "reasonable time," as mutually understood, had not yet elapsed, might well be doubted. If, on a fair trial, under a sale conditioned that the chattel may be returned on thus proving unsuitable and unsatisfactory, the buyer finds it unsuitable and unsatisfactory to him, he may return the chattel peremptorily, in exercise of the option reserved to him, and without giving the seller any opportunity of remedying defects. It matters not that the chattel, after its return to the seller, worked well under his management, without alteration or repair.⁴ And if, as often happens, the buyer has paid down the price, so as not to imperil the seller's interests too far, he may maintain a suit to recover it, under such circumstances, after demanding and being refused payment.⁵ In arriving at a

¹ *Humphries v. Carvalho*, 16 East, 45; *Benj. Sales*, bk. 4, pt. 1; *Story Sales*, § 128.

² *Dewey v. Erie Borough*, 14 Penn. St. 211.

³ *Ellis v. Mortimer*, 1 B. & P. N. R. 257; *Benj. Sales*, bk. 4, pt. 1; *Story Sales*, §§ 128, 250.

⁴ *Aiken v. Hyde*, 99 Mass. 183.

⁵ *Aiken v. Hyde*, *supra*.

determination whether to keep the chattel or not, the buyer is bound to bring to it honesty of purpose, but not skill beyond that of ordinary persons in a like situation; and his judgment should be measured by his capacity to ascertain his own wishes. Little more can be made of the buyer's obligation under the usual sales "on trial."¹

It is a question of fact, usually for a jury to determine, whether, in making an agreed trial, the buyer has used the thing properly, — whether, for instance, if the chattel was exposed to injury or diminution in the course of testing, the buyer, who declines finally to retain it, has been too careless, or experimented too frequently.² The position of the so-called buyer pending the result of trial, and before the lapse of the period embraced under the condition precedent, is, as to the property in his keeping, rather a bailee than that of a buyer, and certainly not, in legal right or responsibility, of a full buyer.³

Upon the lapse of time allowed the buyer for trial, without a return of the article as unsatisfactory, the bargain becomes completed and binding, the property passes, and the buyer is at once liable for the price, if he has not paid or secured it already.⁴ In this posture of the case, a buyer may be bound to pay the price, notwithstanding he has given a notice of defects, while retaining the chattel as though he meant to keep it.⁵ It follows, too, that the seller cannot, for non-payment of price, replevy the property as his own after the period of option has elapsed with the chattel still in the buyer's possession, — so far, at least, as the condition prece-

¹ *Hartford Sorghum, &c. Co. v. Brush*, 43 Vt. 528.

² *Okell v. Smith*, 1 Starkie, 107; *Elliott v. Thomas*, 3 M. & W. 170; *Lucy v. Moufflet*, 5 H. & N. 229.

³ See *Hunt v. Wyman*, 100 Mass. 198; *Hartford Sorghum, &c. Co. v. Brush*, 43 Vt. 528; *Story Sales*, § 400.

⁴ *Story Sales*, §§ 128, 250; *Benj. Sales*, bk. 4, pt. 1. But see, as to the transfer of title conditional upon payment, *supra*, p. 292.

⁵ *Aultman v. Theirer*, 34 Iowa, 272.

dent arising out of such a sale is concerned, — but must sue as in case of an absolute sale.¹

The bargain of “sale or return” has not always been understood in one and the same technical sense.² But the usual import of this expression is, that the chattel is taken by the buyer upon the understanding that it may be returned at his option, within a specified time, if not found satisfactory; though there might be a different contingency expressed, or perhaps none at all. The current of authorities regards this contract as carrying the property absolutely to the buyer, and permitting the seller to sue for goods sold and delivered, if they are not returned to him within the specified, or by implication reasonable, time.³ But the price in such cases is usually adjusted in advance; and, in general, the title seems to be transferred completely to the buyer, subject to defeasance by condition subsequent.

The law under “sale or return” is, in many respects, like that of a sale upon trial, with the leading distinction already noticed; and as to the buyer’s duty of making his dissatisfaction known by returning the article, and the general *status* of the parties after the period of option has passed, little more need be said. But the legal distinction between a bailment and sale must always be kept in view in considering this class of cases. Thus, supposing a contract by which a yoke of cattle is delivered to a hirer “to keep and use in a farmer-

¹ See *Witherby v. Sleeper*, 101 Mass. 138; *Spickler v. Marsh*, 36 Md. 222.

² See *Meldrum v. Snow*, 9 Pick. 441, a case of “sale or return,” where an article sold was to be returned unless sold over by the buyer; *Nevill, In re*, L. R. 6 Ch. 397; *Story Sales*, § 249.

³ *Benj. Sales*, bk. 4, pt. 1; *Moss v. Sweet*, 16 Q. B. 493, overruling *Iley v. Frankenstein*, 8 Scott N. R. 839; *Ray v. Thompson*, 12 Cush. 281; *Perkins v. Douglas*, 20 Me. 317; *Crocker v. Gullifer*, 44 Me. 491; *Hunt v. Wyman*, 100 Mass. 198, *per curiam*; *Spickler v. Marsh*, 36 Md. 222; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Schlesinger v. Stratton*, 9 R. I. 578; *Hall v. Ætna Man. Co.*, 30 Iowa, 215; *Story Sales*, § 313.

like manner for one year," and then to be returned, giving him a privilege to pay a price named and keep them, the rate of hire being agreed on at the time, — this is not a bargain of "sale or return," nor, indeed, more than a bailment, so long as the privilege lies dormant.¹ And even in a "sale or return" bargain, with delivery of the chattel defeasible by condition subsequent, there may be some condition precedent besides, which will prevent the vesting of title immediately in the buyer; for the rule of delivery, with title conditional upon paying or securing the price, has been applied to such cases.²

The buyer's due exercise of his option without waiver is to be gathered from the facts. Thus, where a reaping-machine was sold on condition, that, if it failed to work as represented, the buyer might return it, and thereupon be entitled to receive back the purchase-money, and the buyer, finding it did not work as represented, offered to return the machine, which the seller would not receive, it was held that the agreement then made for a further test by the seller's agent, on the buyer's premises, did not necessarily conclude the buyer's right; and, this test likewise failing, the buyer might drive the machine into his yard, leave it there, and notify the seller to take it away. Upon these facts, the buyer was allowed to sue for and recover the purchase-money.³

If the buyer materially impair the condition of the chattel, by misuse or otherwise, while it is in his keeping, he cannot in general take advantage of the condition under which it was delivered so as to rescind the contract; for the seller ought to be put *in statu quo*.⁴ But for an injury occa-

¹ Chamberlain v. Smith, 44 Penn. St. 431. See also Porter v. Petten-gill, 12 N. H. 299.

² Crocker v. Gullifer, 44 Me. 491; *supra*, p. 305.

³ Hall v. Ætna Man. Co., 30 Iowa, 215. And see Padden v. Marsh, 34 Iowa, 522.

⁴ Ray v. Thompson, 12 Cush. 281.

sioned without the buyer's fault the exception has sometimes been waived; that is to say, in the bargain of "sale or return" of a horse.¹ Obviously there must be instances where chattels, and particularly live animals, taken under agreements of sale or return, will suffer damage and inflict injury, because of those very inherent faults against which the buyer was to be protected by securing this option to return; and under such circumstances the exercise of his right should not be denied him.

There is a recent English case, in which a certain contract, involving a balance as shown by the books of a bankrupt, B., who had been partner in a firm while doing business on his individual account with A., was decided to be not a *del credere* agency for A., but one of "sale or return," and that the money received by B. was his own money, arising out of a sale of his own goods; and, under the course of dealing between himself and A., the right of ownership in each of A.'s consignments was held to have passed to B. as soon as he had sold the goods, and so put the option of returning them out of his power. A *del credere* agent, it is well understood, sells according to the instructions of his principal, like any other agent, and is distinguished simply in the guaranty he makes, that those persons to whom he sells shall perform the contract on their part. But in this case the facts showed that B. was entitled to alter the goods, to manipulate them, to sell them at any price he thought fit after such manipulation, and he was still only liable to pay for them at a price fixed beforehand, without any reference to the price at which he had sold them, or to any thing else than the fact that he had sold them in a particular month: he would debit himself with the price as given in the price-list, giving no particulars of his sales, and pay A. in the next month according to his accounts rendered. The conclusion reached

¹ Head v. Tattersall, L. R. 7 Ex. 7. And see Hunt v. Wyman, 100 Mass. 198.

by the court was, that the produce of the goods sold was not the money of the consignors, that A. had no sale relations with B.'s various customers, and that B. really occupied the position of a person having goods on "sale or return."¹

The buyer's option may be otherwise embodied in a sale contract. It is not uncommon to find, for instance, a bargain made so as to put the time of delivery at the buyer's option. In such a case the buyer is bound to make his election according to the contract, and give the seller reasonable notice before he can put the latter in default; nor will he be allowed by artful and unfair means to gain an advantage over the seller in this respect.² But the seller, on his part, is bound to due diligence; and where, as usually happens, the buyer's option is confined within definite bounds, and the contract points at a final limit for the delivery to become absolute, a strict and punctual performance of the condition, in compliance with the buyer's notice, is imperative on the seller's part; it is his own misfortune if he has not taken such precautions as will enable him to render it.³ All options which are given by a seller should be carefully guarded in their terms, since local usage or the courtesy of trade cannot be set up to modify any clear engagement which he has chosen to enter into;⁴ and if he means to hold himself in general readiness for a demand, a stipulation to deliver so many days after demand may properly be made.⁵

Among the sales known to commercial men is that of goods

¹ Nevill, *In re*, L. R. 6 Ch. 397, James and Mellish, Lords Justices. And see *Meldrum v. Snow*, 9 Pick. 441.

² *Colvin v. Weedman*, 50 Ill. 311.

³ *Cleveland v. Sterrett*, 70 Penn. St. 204; *Snelling v. Hall*, 107 Mass. 134.

⁴ *Snelling v. Hall*, *supra*.

⁵ In this latter case, under the Louisiana code, the property is held to be at the seller's risk until delivery. *Warren v. Kirk*, 24 La. Ann. 150.

“to arrive.” The English decisions under this head, though quite numerous, do not clearly settle when the language thus used shall amount to a condition precedent; or, even then, what that condition shall be. Mr. Benjamin has given the decisions material to this issue quite at length.¹ It is to be remarked, that in such cases are often, though not always, blended two distinct stipulations: one, as to the cargo’s being on the vessel in question; the other, as to the safe arrival of that vessel. Hence may be set up a double condition precedent as a prerequisite of full performance under the contract, — (1st) if the vessel arrive; and (2d) if, on arrival, the subject-matter prove to be on board. Mr. Benjamin, upon a full review of the English decisions, thus classifies them: *First*, Where the language is that goods are sold “*on arrival* per ship A.” (or “*ex ship* A.”), or “*to arrive* per ship A.” (or “*ex ship* A.”), — the two expressions meaning precisely the same thing, — it imports a double condition precedent; viz. that the ship named shall arrive, and that the goods sold shall be on board on her arrival.² *Secondly*, Where the language asserts the goods to be on board of the vessel named, as “1,170 bales *now on passage*, and expected to arrive per ship A.,” or other terms of like import, there is a warranty that the goods are on board, and a single condition precedent, to wit, the arrival of the vessel.³ *Thirdly*, The condition precedent that the goods shall arrive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold, but not consigned to the vendor, and with which he did not affect to deal; but, *semble*, the condition will be fulfilled if the goods which arrive are the same that the vendor intended to sell, in the expectation, which turns out to be

¹ Benj. Sales, bk. 4, pt. 1. And see Story Sales, § 249.

² Boyd v. Siffkin, 2 Camp. 326; Lovatt v. Hamilton, 5 M. & W. 639; Johnson v. Macdonald, 9 M. & W. 600.

³ Idle v. Thornton, 3 Camp. 274; Gorrison v. Perrin, 2 C. B. N. S. 681; Hall v. Rawson, 4 C. B. N. S. 85.

unfounded, that they would be consigned to him.¹ *Fourthly*, Where the sale describes the cargo to be of a particular description, as "400 tons *Aracan Necrensie* rice," and the cargo turns out on arrival to be rice of a different description, the condition precedent is not fulfilled, and neither party is bound by the bargain.²

The American cases incline to regard the stipulation for arrival in a sale of goods "to arrive," whether it be by ocean or inland transportation, as conditional, and the contract as executory, with reference to a transfer of property, until the goods actually arrive. This is the declared doctrine in New York.³ And Judge Scudder, in a recent New Jersey case, thus sums up the results: "The conclusion to which we must come, after a careful examination of these cases, is, that a sale 'to arrive' is conditional, and that if the article contracted for does not arrive, either from the vessel being lost or other cause by accident, and without any fraud or fault of the vendor, the contract is at an end. The contract is executory, and does not pass the property in the goods to arrive. It is merely an agreement for the sale and delivery of the articles named, at a future period when they shall arrive. It is in the nature of a condition, and not a warranty."⁴ But the law of the subject is less elaborately discussed in the United States than in England, and with less reference to shipping; nor, indeed, do the meagre and uncertain legal results appear to sufficiently repay the efforts of writers to frame arbitrary rules for what after all must remain a matter of special interpretation in each individual transaction. It is not hard to perceive that the contract may be such, that upon its fair construction the arrival of the subject-matter shall be found

¹ *Smith v. Myers*, L. R. 5 Q. B. 429; s. c. 7 Q. B. 139.

² *Vernede v. Weber*, 1 H. & N. 311; *Simond v. Braddon*, 2 C. B. N. S. 324. And see *Covas v. Bingham*, 2 E. & B. 836.

³ *Benedict v. Field*, 16 N. Y. 595.

⁴ *Neldon v. Smith*, 7 Vroom, 148.

the true condition precedent, — the actual means of transportation being of no vital importance as an element of mutual assent.¹

This condition is also found in commercial sales of goods “to arrive,” that the seller shall give notice of the name of the ship on which the goods are expected, as soon as he finds it out; and such a condition, if part of the contract, must be strictly fulfilled, as a condition precedent to the seller’s right of enforcing the bargain;² though, by local usage, notice to the buyer’s broker, with whom the contract was made, may suffice for performance of the condition.³

The question of condition precedent may arise upon the construction of other words used in a bargain; for the constant use among business-men of concise, technical, and, to the uninitiated, obscure expressions, is a fruitful source of litigation. Thus, on the full meaning of the word “cargo” in a contract of sale, — whether it requires a single shipment of the whole cargo by a single vessel or not, as a condition precedent on the seller’s part, — the authorities are not in clear accord.⁴ But where the sale of a cargo is by bill of lading, the conditions which it imposes upon the seller must be strictly complied with before he can enforce the bargain.⁵

This rule is laid down for guidance wherever the language of the parties to a sale puts insuperable difficulties in the way of a clear judicial construction: “When a principal gives an order to an agent in such uncertain terms as to be susceptible

¹ *Benedict v. Field*, *supra*; *Neldon v. Smith*, *supra*; *Boyd v. Siffkin*, 2 Camp. 326; *Story Sales*, § 249; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447.

² *Benj. Sales*, bk. 4, pt. 1; *Buck v. Spence*, 4 Camp. 329; *Graves v. Legg*, 9 Ex. 709; s. c. 11 Ex. 642.

³ *Graves v. Legg*, *supra*.

⁴ Cf. *Ireland v. Livingston*, L. R. 2 Q. B. 99, s. c. L. R. 5 Q. B. 516, s. c. L. R. 5 H. L. 395, with *Kruger v. Blanck*, L. R. 5 Ex. 179.

⁵ *Benj. Sales*, bk. 4, pt. 1; *Tamvaco v. Lucas*, 1 E. & E. 581, 592.

of two different meanings, and the agent *bona fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorized, because he meant the order to be read in the other sense, of which it is equally capable.”¹ Upon this principle was decided a leading English case, in which the judges were found quite at variance as to the exact construction of the word “cargo.”²

With regard to a sale by sample, it is frequently laid down in the courts that there is an implied condition that the buyer shall have a fair opportunity of comparing the bulk with the sample. This rule is enforced for the buyer's protection as a legal incident of such sales; nor is the buyer obliged to establish a usage to this effect in order to justify him in refusing to carry out the bargain, wherever the seller is so unreasonable as to deny him the opportunity for examination.³

So, where a thing is sold by a particular description, there is a condition precedent implied, according to the authorities, that the thing which the seller delivers or tenders shall answer the description. And so, generally, where the subject-matter of the sale is unascertained. The force of the term “condition precedent,” in this connection, should be well estimated; for there is a constant tendency at this day, and especially in our American cases, to confuse “condition precedent” with “warranty,” and use the latter term as broad enough for both. Of warranty we shall speak at length in the next chapter; and our present attention is confined to conditions or stipulations which constitute an integral part of a sale contract, on the one hand, as distinguished from statements or assertions, which are collateral or in the nature of a war-

¹ Ireland v. Livingston, on appeal, L. R. 5 H. L. 395, Blackburn, J.

² *Ib.*

³ See c. 6, *post*; Lorymer v. Smith, 1 B. & C. 1; Grimoldby v. Wells, L. R. 10 C. P. 391; Dutchess Co. v. Harding, 49 N. Y. 321.

ranty, on the other. "Where the subject-matter of the sale is not in existence or not ascertained at the time of the contract," said the accomplished author of the *Leading Cases*, "an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is a precedent to any obligation upon the vendee under the contract, because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."¹

The leading idea thus imparted is, that where one sells something different from that actually agreed upon, or ordered, there is not a breach of warranty, as the courts sometimes put it, which, in truth, applies to collateral undertakings; but a non-fulfilment of the contract, a non-compliance with the terms of the bargain, or, it might be said, a non-supply of the thing ordered. To use Lord Abinger's illustration: "If a man offers to buy peas of another, and he sends him beans, he does not perform his contract; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him any thing else in their stead, it is a non-performance of it."² While there are many judges who have treated such implied engagement on the seller's part as a warranty (contrary to what Lord Abinger here inculcates), there are others who shun the use of one term as well as of the other, for fear of misleading; and, again, it has been asserted that whether the buyer's action under a supply of goods not corresponding with the description shall be technically considered an action on a warranty, or an action for the non-performance of a condition, is quite immaterial.³ The want of precision in the use

¹ 2 Smith Lead. Cas. 27.

² *Chanter v. Hopkins*, 4 M. & W. 399.

³ See Erle, C. J., in *Bannerman v. White*, 10 C. B. N. S. 844; *Hogins v. Plympton*, 11 Pick. 97; *Wolcott v. Mount*, 7 Vroom, 262, *per curiam*.

of terms has led to much apparent confusion in this respect; but that the buyer may refuse to perform his part of the bargain, unless the seller who undertakes to supply a chattel of a particular kind or description supplies accordingly, — in other words, that performance of the seller's stipulation is of the essence of the contract, — is a point well settled by the authorities. And the buyer's right, so universally conceded, to refuse performance — or, as it is sometimes said, to repudiate the contract — for the nonconformity of the article delivered to the description under which it was sold, is founded on the seller's engagement by such description that the article sold shall correspond with the description.¹ Nor is there any important difference in this respect between the contract of a dealer and that of a manufacturer to supply chattels of a certain description. The practical application of the doctrine will be studied in our next chapter; but here we add, that one reason why the seller's engagement is not always readily apprehended as a condition precedent in such cases is, that suits involving the principle are by no means brought invariably by the seller to enforce performance of the corresponding condition on the buyer's part, but quite frequently by a buyer who has performed every thing incumbent upon him, and then, upon discovering the want of correspondence to the description, seeks to repudiate the transaction.

There may be a sale by sample, in which the bulk sold shall actually correspond with the sample, and yet, if the sale be clearly of goods answering further a certain description, the condition is not fulfilled because the goods tendered fail to answer the description. Thus, in a sample sale of "for-

¹ *Nichols v. Godts*, 10 Ex. 191; *Bannerman v. White*, 10 C. B. N. S. 844; *Azémar v. Casella*, L. R. 2 C. P. 431; *Josling v. Kingsford*, 13 C. B. N. S. 447; *Benj. Sales*, bk. 4, pt. 1; *Henshaw v. Robins*, 9 Met. 87; *Borrekins v. Bevan*, 3 Rawle, 23; *Hawkins v. Pemberton*, 51 N. Y. 204; *Wolcott v. Mount*, 7 Vroom, 262; *Beals v. Olmstead*, 24 Vt. 114; *Carson v. Baillie*, 19 Penn. St. 375; *post*, c. 6.

eign refined rape-oil," it was held that the tender of something else, though corresponding in fact with the sample, did not bind the purchaser to receive it.¹ And where hops were expressly sold as hops raised without the use of sulphur, — the evidence showing that the stipulation concerning the use of sulphur had been so strenuously insisted upon, that the ordering party would not have knowingly accepted sulphur-grown hops at all, — the buyer was permitted to repudiate the transaction, as soon as he found the hops were raised with the use of sulphur, though he had taken possession in ignorance of the fact, and notwithstanding the sale was by sample, and the bulk corresponded with the sample; for, as the court ruled, the seller had not fulfilled the condition to which he bound himself.² On the same principle, the bargain by an accepted sample, marked "Long-stapled Salem Cotton," of what was really "Western Madras Cotton" (an article not inferior alone, but requiring different machinery for its manufacture), has been recently declared not fulfilled by the tender of long-stapled Salem cotton corresponding to the accepted sample.³

On this same principle, of a sale by description that involves a condition precedent, the bargain for a book or map according to a certain prospectus, is held not to be binding upon the subscriber where the thing when offered proves so materially different as to inherent qualities from that set forth in the prospectus, that it is not the specific thing which was agreed upon. For here the condition to supply, which rested upon the seller, has not been performed.⁴

The same may be said of commercial securities of an incor-

¹ *Nichols v. Godts*, 10 Ex. 191.

² *Bannerman v. White*, 10 C. B. N. s. 844.

³ *Azémar v. Casella*, L. R. 2 C. P. 431-677. And see *Dutchess Co. v. Harding*, 49 N. Y. 321; *Carson v. Baillie*, 19 Penn. St. 375; *post*, c. 6, as to sales by samples.

⁴ *Paton v. Duncan*, 3 C. & P. 336.

poreal character, such as negotiable paper, bonds, and stocks, which are constantly made the subject of sale by description. Indeed, though the buyer had fixed upon a specific instrument, and said he would take it, he is still protected by the law ; for the genuineness of the instrument is so far of the essence of the contract as to be deemed a condition precedent. Here again there is a confusion of language in the courts as between condition and warranty. Yet the effect in principle is admitted to extend to repudiation *in toto* by the buyer, and the recovery of his purchase-money, if already paid, or a refusal to take and pay for it when the spurious thing is tendered for his acceptance. The condition to which the seller was bound in such a case is unfulfilled wherever the thing is not the genuine thing bargained for, and the material consideration of the sale fails of effect ; as where the thing was false and counterfeit ; where, purporting to be the existing bond of a foreign government, it proved to belong to a class of obligations already repudiated ; where, being negotiable paper, names signed or indorsed upon it prove to have been forged ; and so on.¹ It is not for the identity of the paper alone, but for the *bona fides* of the obligation, as evinced upon its face, that the courts are so solicitous ; and the general welfare of society requires the law to protect the buyer of property whose great intrinsic value or utter worthlessness may hang upon a single circumstance. Even though the thing be not entirely worthless, but has some value, — as where one good indorsement on a note proves genuine, though the other signatures were forged, — the rule of condition precedent still applies, and the contract of sale fails for lack of consideration.² But if, as a matter of fact, the incorporeal chattel

¹ *Young v. Cole*, 3 Bing. N. C. 724 ; *Gompertz v. Bartlett*, 2 E. & B. 849 ; *Westropp v. Solomon*, 8 C. B. 345 ; *Benj. Sales*, bk. 4, pt. 1 ; *Aldrich v. Jackson*, 5 R. I. 218 ; *Ledwich v. McKim*, 53 N. Y. 307 ; *Merriam v. Wolcott*, 3 Allen, 258 ; *Story Sales*, § 367.

² *Gurney v. Smith*, 4 E. & B. 133.

delivered is really what both parties intended it, even though the thing be not described with literal accuracy, the seller fulfils his condition precedent by delivering or tendering it.¹

Hence is it that the contract of sale fails if the subject-matter be a bill or promissory note, and all or any of those signatures upon which a buyer has the right to rely prove not to be genuine.² Even where one gets a note discounted at a bank without indorsing it, he is held to have warranted by implication that its signatures are genuine.³ Or where one indorses without recourse.⁴ It would appear that the sale of a note imports a warranty or condition precedent that each name upon which a buyer relies was signed by a person capable of binding himself by a valid contract.⁵ So rigid is the rule, that it has been enforced against a broker who sold a forged note for an undisclosed principal for less than its face, and then paid the money over.⁶ If the seller was guilty of fraud, the buyer's right to repudiate the sale is doubly sure.⁷

Here the authorities concerning implied conditions in sale contracts appear to rest. But the argument might be extended further. Not only sales of unspecified corporeal chattels, but those likewise of specific chattels; not sales by sample or by description alone, but sales with the subject-matter already clearly identified,—may involve certain implied conditions as a necessary sequence of the bargain. If a spe-

¹ *Mitchell v. Newhall*, 15 M. & W. 308; *Lambert v. Heath*, 15 M. & W. 487.

² *Gurney v. Smith*, 4 E. & B. 133; *Aldrich v. Jackson*, 5 R. I. 218; *Dumont v. Williamson*, 18 Ohio St. 515; *Terry v. Bissell*, 26 Conn. 23; *Ledwich v. McKim*, 53 N. Y. 307. *Contra*, *Baxter v. Duren*, 19 Me. 434.

³ *Cabot Bank v. Morton*, 4 Gray, 156.

⁴ *Dumont v. Williamson*, 18 Ohio St. 515.

⁵ See *Lobdell v. Baker*, 1 Met. 193; *Story Sales*, § 367. But see *Baldwin v. Van Deusen*, 37 N. Y. 487.

⁶ *Merriam v. Wolcott*, 3 Allen, 258; *Thrall v. Newell*, 19 Vt. 202; *Canal Bank v. Bank of Albany*, 1 Hill, 278.

⁷ *Bell v. Cafferty*, 21 Ind. 411. And see *Webb v. Odell*, 49 N. Y. 583.

cific article is purchased, which the seller is to send home to the buyer, there is an implied condition of the contract that the identical thing shall be delivered. The genuineness of the thing throughout, its continuous specific identity, is an essential, when any thing intervenes between the striking of the bargain and the final transfer of possession. Wherever a seller has had the opportunity to substitute something, if unfairly disposed, for the article actually contracted for, before the buyer could get possession, the inference is natural that the buyer shall have a right to inspect the property sufficiently to make sure that the identical thing is delivered, before accepting and paying for it; in other words, that the bargain did not contemplate the buyer's performance of his duties while blindfolded by the other. The genuineness of the thing, its identity as the specific article contracted for, must be fundamental in every contract for specific chattels; and the delivery of something else if the seller was bound to delivery, or the taking of something else if the buyer was bound to send and take away, is not a breach of collateral undertaking merely, but a non-fulfilment of the condition to which the party had bound himself. Every sale transaction, in short, whether relating to specific or unspecified chattels, is to be interpreted according to its express or implied terms; and the conditions, express or implied, are deducible accordingly.

CHAPTER VI.

WARRANTY.

WHAT has been said in the preceding chapter of conditions under a contract of sale has prepared the way for a full discussion of the vexed subject of warranty. Stipulations attending sales in the nature of warranty are almost invariably found in practice to be such as impose an obligation upon the seller; far more so than conditions, which are of mutual force: and yet warranty, if properly understood, has no exclusive reference, logically speaking, to either party, but comprises all collateral undertakings on either side which form a part of the contract. A sale, however, differs from most other contracts in presenting generally little for one party to undertake which is not an integral part of the agreement, but much for the other.

Our law of sales has run into a maze of confusion over this subject of warranty. Fraud, condition, representation, and warranty are subjects constantly mingled in legal discourse; rules overlap; and, as between implied conditions and implied warranties, the courts are at decided variance. Warranty, as we apply the word to real estate, seems to have exclusive reference to title; and in the law of insurance the term has become one of peculiar significance, denoting clauses in the nature of conditions which must be strictly complied with.¹ What the word "warranty" shall mean in connection with the law of sales is not well agreed; but that for which we

¹ Bouv. Dict. "Warranty;" 1 Sch. Pers. Prop. 686.

contend is substantially what Lord Abinger claimed, when distinguishing warranty from conditional statements: "A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, collateral to the express object of it."¹ This definition has met the approval of English law-writers of high repute.² And that warranty stipulations are not vital to the sale either of real or personal property can be demonstrated, the objective point in all such transactions being to accomplish a transfer of property from one party to the other, so that the buyer may get the genuine thing, and the seller his *quid pro quo*; while to secure the buyer absolutely in his title against the world or not, to make his enjoyment more or less beneficial to him, to engage that the thing shall or shall not have certain qualities, — all these are alternatives incidental to the transaction, and not an inseparable part of it.

But "warranty" and "representation" are not convertible terms. We are not, perhaps, to take our distinction as the courts have put it with regard to insurance contracts;³ though even there it can be said that the sale of an indemnity against loss from a specified contingent cause requires of itself no such verbosity of so-called conditions as a policy now-a-days sets forth, but has rather for its express object the undertaking of a certain risk as to certain subject-matter for a certain compensation. We only observe, that while representations are statements which might be made prior or subsequent to the bargain, as well as contemporaneous with its formation, it is only with those representations which are so made as to become a part of the contract, those which lead parties to the *aggregatio mentium*, those which enter into the bargain,

¹ Chanter v. Hopkins, 4 M. & W. 399.

² See Benj. Sales, bk. 4, pt. 1; ib. bk. 4, pt. 2, c. 1, § 1; 2 Smith Lead. Cas. 33, 34.

³ 1 Sch. Pers. Prop. 686; *supra*, p. 326.

that the law of warranty in sales of personal property is concerned. A warranty need not, of course, be made at the conclusion of the bargain; but it should, at least, be more than a mere statement by way of inducement to the purchase: it should enter into the treaty, and constitute part of the basis of the sale. Thus, if I have a horse to sell, and expressly offer him as suitable for the saddle, and one who is known to be buying a horse for that special purpose takes him on the faith of my statement, the statement may prove to be a warranty: not so, however, if, offering the horse to one who is supposed to purchase for ordinary use, I state, as a mere matter of opinion and to help on the bargain, that the horse is good in the saddle.¹ The application of the distinction is sometimes extremely difficult, but the principle itself is perfectly sound; for the question at issue is, whether the representation appears to have been an understood element of the contract. As to a representation made subsequently to the conclusion of the bargain, it cannot have the force of a warranty, since such a representation comes too late to have entered into the original consideration of the sale contract at all: there must be some new consideration super-added before it can attain that character.²

The leading principle of the law of warranty in sales at the common law is, that a purchaser buys at his own risk; *caveat emptor*. But upon this rule, which applies more especially to the quality of the subject-matter, so as to throw all risks in this respect upon the purchaser of a specific chattel, have been ingrafted numerous exceptions, as we shall see

¹ See *Hopkins v. Tanqueray*, 15 C. B. 130; *Benj. Sales*, bk. 4, pt. 2, c. 1, § 1; *Beals v. Olmstead*, 24 Vt. 114; *Carter v. Black*, 46 Mis. 384; *McConnel v. Murphy*, L. R. 5 P. C. 203; *Baker v. Henderson*, 24 Wis. 509; *Lawton v. Keil*, 61 Barb. 558; *Horton v. Green*, 66 N. C. 596; *Tewkesbury v. Bennett*, 31 Iowa, 83; *Smith v. Justice*, 13 Wis. 600.

² *Roscorla v. Thomas*, 3 Q. B. 234; *Summers v. Vaughan*, 35 Ind. 323; *Congar v. Chamberlain*, 14 Wis. 258; 3 Bl. Com. 166.

when we come to treat of implied warranty. Wherever the seller has given an express warranty, or the law implies a warranty from the circumstances, or the buyer can bring fraud home to the party from whom he purchased, the doctrine of *caveat emptor* fails of application.¹

An executory contract may involve an express warranty of binding force, as well as an executed contract which has been fully consummated.² But a guaranty that goods sold will pass inspection will not change an executed sale into a mere executory contract: it is, in effect, an express warranty of soundness to that extent.³

Warranties may be given by an agent, as well as by the principal party himself; and the common rule here applies, that acts which are within the general scope of the agency, though in violation of the principal's private instructions, shall be upheld on behalf of those dealing with the agent in good faith, and supposing him to have full powers. As an agent to sell is presumed to have authority to do whatever is usual in the course of the particular business, he may expressly warrant, if it be the custom of a seller to do so under like circumstances.⁴ Accordingly, the agent of a professional horse-dealer has been held to bind his principal by a warranty of soundness, even though privately instructed not to do so; the buyer having received no knowledge of such instructions before completing the purchase.⁵ And an agent, authorized to sell a manufactured article for the makers, has

¹ Story Sales, § 349; Benj. Sales, bk. 4, pt. 2, c. 1, § 1; *infra*, p. 353.

² Parks v. Morris, &c. Co., 54 N. Y. 586; Polhemus v. Herman, 45 Cal. 573.

³ Gibson v. Stevens, 8 How. 384.

⁴ Story Sales, § 350; Benj. Sales, bk. 4, pt. 2, c. 1, § 1; Brady v. Todd, 9 C. B. N. s. 592; Dingle v. Hare, 7 C. B. N. s. 145; Bryant v. Moore, 26 Me. 84; Williamson v. Connaday, 3 Ired. 349; Upton v. Suffolk County Mills, 11 Cush. 586; Howard v. Steward, L. R. 2 C. P. 148; Story Agency, §§ 102, 443.

⁵ Howard v. Steward, L. R. 2 C. P. 148.

been allowed, under a similar state of facts, to bind them by express warranty of reasonable fitness.¹ It would appear to be quite in accordance with usage in certain localities that a commission merchant should be allowed to warrant the goods he sells as of good quality.² The implied warranty that the bulk shall correspond in sample sales, the implied warranty of quality where goods are supplied to order, and indeed every warranty which the law necessarily infers from the simple fact of such a sale, comes within the scope of an authority to make the sale, as an integral part of the sale itself.³

But the rule of agency itself suggests the true limitations of this doctrine. There may be general agents with large powers, and special agents with limited powers; and a party held out merely as one of the latter class cannot bind his principal by acts which go beyond the reasonable scope of his powers; nor can an express warranty, which shall bind the owner of chattels, be given by one whose authority to sell is manifestly, under all the circumstances, in the nature of a restricted or special agency, unless he can show that his authority covers the whole ground. Hence is it, as the English cases hold, that, while a party carrying on the general business of horse-dealing is presumed to have authority to expressly warrant the horses he may have on hand, the contrary is true of a private owner's servant, who is intrusted to sell and deliver a horse on a particular occasion: the former may expressly warrant; the latter cannot.⁴ So, too, the authority of an auctioneer, or any mere broker, to give an express warranty, should be subjected to strict scrutiny before it can be

¹ *Boothby v. Scales*, 27 Wis. 626.

² *Randall v. Kehler*, 60 Me. 37.

³ *Andrews v. Kneeland*, 6 Cow. 354; *Upton v. Suffolk County Mills*, 11 Cush. 586; *Boothby v. Scales*, *supra*; *Story Agency*, § 102; *Palmer v. Hatch*, 46 Mis. 585.

⁴ *Brady v. Todd*, 9 C. B. N. S. 592, distinguishing *Alexander v. Gibson*, 2 Camp. 555.

recognized.¹ Again : though a more general agent with power to sell may give such express warranties as are the usual and proper incidents of the sale, besides holding the owner whom he represents to the fulfilment of every warranty which the law implies, he cannot, without more express authority, give an unusual warranty of like binding force ; as, for instance, where an agent to sell flour, not content with warranting its present quality, undertakes, on behalf of his principal, to go further, and warrant its continuing good quality for a given period.² Any buyer, who takes a warranty transcending the reasonable scope of the selling agent's authority, takes it at the risk of being able to prove that the agent had his principal's authority to that extent ; and, if he cannot show such authority in point of fact, the law will not infer it for him. "It is unnecessary to add," says Erle, C. J., in *Brady v. Todd*, "that, if the seller should repudiate the warranty made by his agent, it follows that the sale would be void ;"³ in which case the transgressing agent and credulous buyer must, of course, adjust the losses of the bargain as their own personal affair.

The position assumed by the selling agent, as to the quality of goods which he contracts to supply, is sometimes that of an arbitrator, with rights and duties to be adjusted accordingly. Thus, where a selling broker had made a written contract of sale on his principal's account of Smyrna raisins to arrive in London, of "fair average quality in opinion of selling broker," and then rejected them on their arrival as not being of "fair average quality," it was decided that he was not responsible to his principal for the exercise of reason-

¹ *Bartholomew v. Warner*, 32 Conn. 98; *Blood v. French*, 9 Gray, 197; *Dodd v. Farlow*, 11 Allen, 426; *The Monte Allegre*, 9 Wheat. 644.

² *Upton v. Suffolk County Mills*, 11 Cush. 586; *Smith v. Tracy*, 36 N. Y. 79. See, as to joint-owners, *Holmes v. Wood*, 32 Ind. 201.

³ *Brady v. Todd*, 9 C. B. N. s. 592; *Benj. Sales*, bk. 4, pt. 2, c. 1, § 1; *Story Sales*, § 350.

able care and skill, but that, notwithstanding any possible error of judgment on his part, his act in rejecting the goods was merely that of a *quasi* arbitrator.¹

Custom may be shown, in certain cases, to have affixed a peculiar meaning to certain words and expressions used in the contract of sale. But to reconcile the decisions on the point of local custom or usage is not easy. The courts are not disposed to create an express warranty upon any such suggestion; and the custom or usage should at least be certain, reasonably and sufficiently old, to justify the presumption that it was so generally known at the time of the sale transaction as most probably to have entered into the calculation of both parties.² Thus, the statement of so much as the "invoice weight" in a bill of sale is not, on the allegation of custom or usage, to be taken as a warranty that the actual weight is the same as the invoice weight.³ Nor is a custom to warrant against latent defects to be favored.⁴ Nor is evidence of a custom or usage of implied warranty against false packing admissible where the parties had no knowledge of such a custom.⁵ But custom may define the contract in a certain point, where it gives precision, and does not contradict.⁶ Nor is there any rule of law which prevents custom from being established by a single witness.⁷ The true doctrine appears to be this: that a warranty may be inferred from a clear custom or usage, reasonable in itself, and likely to have been contemplated in the particular transaction;

¹ *Pappa v. Rose*, L. R. 7 C. P. 32; s. c. L. R. 7 C. P. 525.

² *Leggat v. Sands' Ale, &c. Co.*, 60 Ill. 158; *Whitmore v. South Boston Iron Co.*, 2 Allen, 58; *Story Sales*, § 358; *Barnard v. Kellogg*, 10 Wall. 383; *Baker v. Squier*, 3 Thomp. & C. (N. Y. Supr.) 465.

³ *Rice v. Codman*, 1 Allen, 377.

⁴ *Whitmore v. South Boston Iron Co.*, 2 Allen, 58; *Dickinson v. Gay*, 7 Allen, 34.

⁵ *Barnard v. Kellogg*, 10 Wall. 383.

⁶ *Robinson v. United States*, 13 Wall. 363.

⁷ *Ib.*

but that custom or usage cannot be set up to defeat the plain purpose and scope of the transaction, nor to ingraft upon the contract an undertaking unreasonable of itself, or contrary to the policy of the law.¹ It may be added, that any warranty expressed in technical terms is, in the absence of distinct proof of a contrary mutual intent, to be construed in the technical sense.²

A waiver of warranty; or rather of the right to avail one's self of its breach, may be established by suitable evidence. Thus, where the buyer of warranted goods unreasonably fails to inform the party from whom he purchased of the breach of warranty in season to leave to the latter his due rights against others for the alleged defect, the law will infer a waiver on the buyer's part.³ Other circumstances, such as the buyer's acceptance of the chattels without complaint, and upon due examination, followed by lapse of time, as well as an express waiver on his part, may operate as a bar to proceedings otherwise available under the warranty.⁴ So if a buyer orders separate lots, and finds that some do not correspond with the order, he must be prompt and decided in his course; for if he undertakes to keep all the lots while engaged in a controversy with the seller, and to pay for none until he has been supplied with all according to the agreement, he may find himself liable to pay for the whole, as upon so many separate contracts.⁵

The leading principles of the law of warranty in sales will

¹ Story Sales, § 358; Benj. Sales, bk. 4, pt. 2, c. 1, § 3; Jones v. Bowden, 4 Taunt. 847; Boardman v. Spooner, 13 Allen, 353; Leggat v. Sands' Ale, &c. Co., 60 Ill. 158.

² Story Sales, § 361. As to what shall govern if local usages differ, see Star Glass Co. v. Morey, 108 Mass. 570.

³ Hall v. McEwen, 19 Mich. 95; Couston v. Chapman, L. R. 2 Sc. App. 250.

⁴ See buyer's remedies, *infra*.

⁵ Couston v. Chapman, L. R. 2 Sc. App. 250.

become more apparent upon a division of the subject for treatment under these two heads: (1.) Express warranty; (2.) Implied warranty. Express warranty arises where one specially undertakes to make sure to the other that the thing sold is as represented; but an implied warranty is one which the law deduces as an inevitable consequence of the contract, notwithstanding there had been no special undertaking in the matter.

(1.) As to express warranty. What has already been said of warranty in general is quite pertinent. Thus, to determine whether an express representation shall have the force of a warranty, we ask whether the representation was an element of the bargain, — whether the parties designedly used it by way of building material in their mutual transaction. This is an issue of fact, to be decided according to the evidence presented; and, doubtless, that which in one case amounted to no warranty at all, will, in another, become necessarily a warranty, because of the circumstances. As, for instance, in the sale of a horse, a representation made by the seller that the animal is only so many years old; to which undertaking the seller of a horse clearly does not mean to bind himself in ordinary cases, but which is sometimes of vital importance.¹ The English authorities furnish this as a decisive test of warranty for most instances: whether the seller assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the seller has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment; for in the former case there is a warranty, but in the latter none.²

But when we come to examine the decisions, we find an

¹ *Burge v. Stroberg*, 42 Geo. 88.

² *Benj. Sales*, bk. 4, pt. 2, c. 1, § 1; *Buller, J., in Pasley v. Freeman*, 3 T. R. 51; 2 Sm. Lead. Cas. 157.

absence of universal tests; much that is worthless set forth by way of *dicta*; and the constant disposition manifested on the part of judge and jury withal to do what is substantially right by the bargaining parties, consistently with the particular circumstances of the case. And where the seller's conduct, by way of coaxing on a trade, is open to the suspicion of wilful misrepresentation, all the more sedulously will the court maintain the buyer's cause, by turning statements of doubtful import into an express warranty. There is much apparent confusion in the cases. Thus, the seller's mere commendation of what he sells is held to be no warranty; and, indeed, the fact that he simply answers the buyer's question, instead of volunteering the statement, seems not without its legitimate bearing in his own favor.¹ Where, in a verbal bargain for a certain amount of sound corn to be delivered, the seller stated that he had just purchased the corn from another person as sound corn, and would sell it as such, it was held that this was merely a representation, and not a warranty.² So, too, where the buyer was present, with full opportunity to see how the seller packed the goods, and the seller assured him that they were not injured by the packing; the more so in this case, that a bill of sale which was made out made no mention of any such warranty.³ A statement by the seller, that the chattel he sells "is all right," is rather too vague to serve as an express warranty of soundness; but its bearing in this direction may depend upon circumstances.⁴ So a statement of efficiency, as applied to all chattels of the same general description with the article sold, and not made with special reference to this particular article, will not readily be construed as a warranty of the article's quality; as where the vendor of a machine affirms in general

¹ *Tewkesbury v. Bennett*, 31 Iowa, 83.

² *Lawton v. Keil*, 61 Barb. 55.

³ *Baker v. Henderson*, 24 Wis. 509.

⁴ *Tuttle v. Brown*, 4 Gray, 457; *Smith v. Justice*, 13 Wis. 600.

terms the fitness of all machines sold under that patent.¹ It is sometimes said, that no express warranty arises from "a mere unfounded naked affirmation" of soundness in a sale, though for deceitful representation there would be a remedy.² And in numerous cases the favorite distinction made is between a statement of fact and an expression of judgment or opinion; the former being laid off as a warranty, and the latter as a mere representation,—a rule, however, quite capricious in its workings.³

Even if we are to construe a certain statement into a warranty, that statement may be found so expressly limited as to amount at best only to a conditional or qualified warranty in favor of the buyer. Thus, if I offer a horse for sale, and, upon being asked to warrant the animal free from lameness, do so, at the same time qualifying the statement by showing a bruise, and directing that the part be treated with a certain liniment in order that it may be cured, the warranty may be deemed conditional upon such treatment.⁴ So an absolute warranty may prove to be modified by general rules which the seller promulgates as applied to all sales of this description, and which are duly brought to the buyer's knowledge before the bargain is struck.⁵ A seller who expressly warrants for a limited time only is liable only for faults discovered and pointed out by the buyer within the stated period.⁶ All restrictions and limitations, in short, to which any express warranty is clearly subjected, must be allowed to operate.⁶ But wherever the seller's statement was intentionally made the basis of the sale, where it was

¹ *Chalmers v. Harding*, 17 L. T. N. s. 571.

² *Weimer v. Clement*, 37 Penn. St. 147.

³ See *Horton v. Green*, 66 N. C. 596; *Reed v. Hastings*, 61 Ill. 266; *Story Sales*, § 358.

⁴ *Smith v. Borst*, 63 Barb. 57.

⁵ *Bywater v. Richardson*, 1 Ad. & E. 508.

⁶ *Story Sales*, § 363; *Bywater v. Richardson*, 1 Ad. & E. 508; *Chapman v. Gwyther*, L. R. 1 Q. B. 463.

put forth (as appears likely upon a reasonable interpretation of the whole contract) as something for the buyer to rely upon by way of warranty, and the buyer has relied upon it accordingly, and entered into the sale upon the faith of it, such statement will be construed as an express warranty.¹

No special form of words is necessary to constitute an express warranty. The word "warrant," though customarily employed, need not, in fact, be used at all. Thus, certain representations concerning a sinking fund, which had been made by the municipal authorities in a sale of city bonds, were held to constitute a warranty that the bonds would be secured by a fund adequate for their final redemption.² "An affirmation at the time of a sale," said Judge Buller in 1789, affirming a statement made by Lord Holt nearly two centuries ago, "is a warranty, provided it appear in evidence to have been so intended;" by intention, meaning, of course, a mutual intention of the parties.³ For the construction of an express warranty is upon common sense and reasonable interpretation, the question of intention going usually to a jury upon the facts;⁴ though, where the question is raised upon a written contract solely, the interpretation and effect of that contract is the province of a court, rather than a jury.⁵ The statement made by one party must be taken in its rational and appropriate sense; and if the other party, relying upon such an understanding of language

¹ See *Benj. Sales*, bk. 4, pt. 2, c. 1, § 1; *supra*, p. 334; *Story Sales*, §§ 352, 353; *Beals v. Olmstead*, 24 Vt. 114; *Carter v. Black*, 46 Mis. 384; *Polhemus v. Heiman*, 45 Cal. 573; *Callanan v. Brown*, 31 Iowa, 333; *Reed v. Hastings*, 61 Ill. 266; *Hawkins v. Pemberton*, 51 N. Y. 198.

² *Callanan v. Brown*, 31 Iowa, 333.

³ *Buller, J.*, in *Pasley v. Freeman*, 3 T. R. 57, citing *Cross v. Gardner*, 3 Mod. 261.

⁴ *Benj. Sales*, bk. 4, pt. 2, c. 1, § 1; *Stucley v. Bailey*, 1 H. & C. 405; *Gammar v. Borgain*, 27 Iowa, 369; *Congar v. Chamberlain*, 14 Wis. 258; *Vincent v. Leland*, 100 Mass. 432; *Morrill v. Wallace*, 9 N. H. 111; *Story Sales*, § 357.

⁵ *Brown v. Bigelow*, 10 Allen, 242.

in its full import, was induced to enter into the bargain, the general law of contracts forbids the former to slip back and leave the latter to suffer ; for the intention to be gathered is not so much the actual intention of either, as the reasonable intention of both.¹

The time at which the statement was made has some influence in determining whether or not it amounted to an express warranty. Thus, representations made by a seller one month *before* the sale was consummated have been held too remote to constitute a warranty ;² and, in general, a warranty, to be binding, should be contemporaneous with the sale. But such a deduction must be drawn from the evidence ; and where the proof shows that the parties intended to have the antecedent statement incorporated with the bargain, it will have this effect ; as in the case of an offer to warrant the chattel made at the commencement of the negotiation, upon the faith of which the sale was concluded some days later.³ Of an express warranty made *after* the conclusion of the bargain, Blackstone says : “ The warranty must be *upon the sale* ; for if it be made *after* and not *at* the time of the sale it is a void warranty ; for it is then made without any consideration ; neither does the buyer then take the goods upon the credit of the vendor.”⁴ But this must be understood to mean statements made after the bargain which seek the protection of the original consideration ; for any warranty made after the original sale, upon a consideration distinct from the sale itself, is valid, like any substituted agreement of parties ; as where a seller, in default upon his condition, induces the buyer to waive a breach and accept performance in consideration of

¹ See *Stroud v. Pierce*, 6 Allen, 413 ; *Smith v. Justice*, 13 Wis. 600.

² *Bryant v. Crosby*, 40 Me. 9 ; *Hogins v. Plympton*, 11 Pick. 97 ; *Pinney v. Andrus*, 41 Vt. 631.

³ *Wilmot v. Hurd*, 11 Wend. 584 ; *Benj. Sales*, bk. 4, pt. 2, c. 1, § 1 ; *Story Sales*, § 356.

⁴ 3 Bl. Com. 166. And see *supra*, p. 328.

his giving an express warranty upon some point.¹ A statement made after the sale may afford proof of a warranty given at the time of the sale.²

There seems to be no good reason for holding, as Blackstone appears to have done, that a warranty can have no prospective operation; and his illustration — that one may warrant “that a horse is sound at the buying of him, not that he will be sound two years hence” — is certainly an ill-founded statement, though showing, perhaps, only his misapprehension of the rule under which he had instanced it.³ Lord Mansfield has said, “There is no doubt but you may warrant a future event;”⁴ and it has been expressly held that the seller’s warranty, reaching the quality of the subject-matter sold some time hence, is as good as a warranty of present quality.⁵

It may be gathered from what has been said already, that, in controversies over express warranty, a determining circumstance in favor of the buyer is, that a serious defect covered by the seller’s statement was one which was peculiarly within the seller’s own knowledge, and not open to the buyer’s inspection; for here the seller cannot easily escape the dilemma of intended fraud by concealing his knowledge of the defect, on the one hand, and intended warranty by honestly affirming the thing good in spite of the defect, on the other. But *caveat emptor* is still the cardinal rule. While a seller is perfectly free to warrant the subject of sale expressly against defects which the buyer has had ample opportunity of examining for himself, he is not presumed to go so far; and hence against defects which were apparent on simple inspection, and of whose extent the buyer could readily have judged before

¹ *Congar v. Chamberlain*, 14 Wis. 258. And see *Vincent v. Leland*, 100 Mass. 432; *Roscorla v. Thomas*, 3 Q. B. 234.

² *Tuttle v. Brown*, 4 Gray, 457.

³ 3 Bl. Com. 166.

⁴ *Doug.* 735; *Christian’s n. to* 3 Bl. Com. 166.

⁵ *Congar v. Chamberlain*, 14 Wis. 258.

making the purchase, the seller's simple statements are usually no warranty, in the absence of fraud on his part.¹ These are all rules of convenience for determining the mutual intention of the parties in doubtful cases. That the seller may by express warranty bind himself even in respect to open defects, so as to protect the buyer against all the evil consequences thence possibly ensuing, there can be no question ; and, as we shall presently see, diseased and unsound animals are frequently sold in this manner. And even though an examination would have revealed undiscovered defects to the buyer, yet the sale may have been with the intention that the buyer should not examine for himself.² This is illustrated by a Vermont case, where hay was sold for keeping oxen during the spring and summer while working on the railroad ; and the seller said the hay was good hay, cut early, and cut around the barn, and got in in good order. Here it was held — the hay appearing afterwards to be full of brakes, and not cut around the barn — that the seller's statement amounted to a warranty.³ A fact also alluded to was, that there had been no examination intended at the time of the purchase, — a circumstance still more weighty in the buyer's favor, should it appear that the seller tried to throw him off his guard, and induce him to forego inspection.⁴ For latent defects unknown to the seller, in a specific thing sold, there should be clear evidence of an express warranty on his part, in order to render him liable.⁵

An express warranty is often given in writing ; and it may be worth considering whether that which one puts deliber-

¹ Gaylord Man. Co. v. Allen, 53 N. Y. 515.

² *Infra*, p. 351; Pinney v. Andrus, 41 Vt. 631; Story Sales, §§ 355, 356; Henshaw v. Robins, 9 Met. 83.

³ Beals v. Olmstead, 24 Vt. 114.

⁴ Pinney v. Andrus, 41 Vt. 631.

⁵ Parkinson v. Lee, 2 East, 314; Kingsbury v. Taylor, 29 Me. 508; Hadley v. Clinton, &c. Co., 13 Ohio, n. s. 502; Frazier v. Harvey, 34 Conn. 469; Lord v. Grow, 39 Penn. St. 88. And see, as to implied warranty, *infra*.

ately upon paper regarding the subject of sale may not be more readily presumed an intentional warranty than the mere oral statements of a negotiation which are casually thrown out, and whose literal expression and full import must so often be left to conjecture. The English cases appear disposed to leave the question of intention pretty much to a jury, even where the bargain relied upon is in writing; and this is perhaps the true rule, where there are attendant circumstances to be considered, and not merely the construction of the instrument itself.¹ But where the whole question of intent turns upon the interpretation of a certain bill of sale, a continuous correspondence, or other writings, the court may take the case into its own hands, and decide upon inspection of the papers; to which effect are a number of American decisions.² It should be borne in mind that any statement importing warranty, though a contract of itself, and capable of separate construction, is yet but the outgrowth of a more extensive contract, — namely, that of bargain and sale; and hence that there may be surrounding circumstances attending the writing and delivery of the statement to the buyer which go to show that an express warranty was in fact contemplated by the parties, or the reverse. Such evidence should be sifted and weighed; and, as it would seem, its general preponderance may well be left to the determination of a jury.³

Parol evidence is in general inadmissible, wherever the contract of sale is expressed in writing, to prove a warranty not stated therein, or to extend a warranty which is expressed. For though there were oral conversation over the terms of

¹ Benj. Sales, bk. 4, pt. 2, c. 1, § 1; *Stucley v. Bailey*, 1 H. & C. 405.

² *Wason v. Rowe*, 16 Vt. 525; *Merriam v. Field*, 24 Wis. 640; *Sparks v. Messick*, 65 N. C. 440; *Stroud v. Pierce*, 6 Allen, 413; *Randall v. Thornton*, 43 Me. 226; *Brown v. Bigelow*, 10 Allen, 242; *Parks v. Morris, &c. Co.*, 54 N. Y. 586; *Ranger v. Hearne*, 37 Tex. 30; *Leggat v. Sands' Ale, &c. Co.*, 60 Ill. 158.

³ See *Stucley v. Bailey*, *supra*; *Hahn v. Doolittle*, 18 Wis. 196.

the intended sale, yet, the contract being in the end reduced to writing, the whole transaction merges in that writing. Thus, where a ship, the subject of sale, had been verbally represented by the seller to be "copper-fastened," but the bill of sale of the ship contained no allegation of the kind, it was held that the oral representation constituted no warranty.¹ And where a bill of sale or other writing professes to give the substance of the seller's express undertakings, nothing is to be added thereto, by evidence or implication, to enlarge his liability; or, as it is said, the writing containing some express warranties, oral proof of others is inadmissible.² But the statement of express warranties, whether verbal or written, does not exclude by inference the seller's liability under what the law deems an implied warranty of sale.³

Nor, again, does the reason of the rule which excludes parol evidence extend to writings which are not used or intended by the parties to set forth the terms, conditions, or warranties of the sale; and from this point are seen various exceptions. Thus, a bill of sale, which is executed merely in part performance, may be supplemented by evidence of the full agreement of sale.⁴ An ordinary bill of parcels, signed by the seller, has in numerous instances been regarded as an insufficient memorandum of the whole contract of sale to debar the buyer from proving an express warranty by parol evidence; whence comes it that express warranties of quality, of correspondence of goods with the sample, and so on, have been specially proved.⁵ So, too, writings in the nature of a

¹ *Kain v. Old*, 2 B. & C. 672; *Benj. Sales*, bk. 4, pt. 2, c. 1, § 1. And see *Pender v. Fobes*, 1 Dev. & Bat. 250.

² *Ib.*; *Dickson v. Zizinia*, 10 C. B. 602; *Merriam v. Field*, 24 Wis. 640; *Ranger v. Hearne*, 37 Tex. 30; *Sparks v. Messick*, 65 N. C. 440; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52.

³ *Merriam v. Field*, *supra*; *Bigge v. Parkinson*, 7 H. & N. 955; *infra*, as to implied warranty. ⁴ *Merriam v. Field*, 24 Wis. 640.

⁵ *Harris v. Johnson*, 3 Cr. 311; *Hazard v. Loring*, 10 Cush. 267; *Boardman v. Spooner*, 13 Allen, 353; *Atwater v. Clancy*, 107 Mass. 369.

receipt do not shut out oral proof of an express warranty, and for the same reason, that they are not designed as a reduction of the mutual contract to writing.¹ But while an informal document may be thus verbally explained so as to show an express warranty, or, indeed, a totally different transaction from that manifested on its face, a paper purporting to be a receipt, or mere bill of parcels, which really means to set out the whole contract, cannot be enlarged by oral proof of an express warranty.²

An express warranty may be made out from parol words and acts followed by certain writings. Thus where, warranted, a sale of merchandise is verbally made upon credit, the quantity not being at the time ascertained, and the seller forwards a written bill of sale thereof, stating the quantity and price only, and afterwards ships the goods to the buyer, the whole transaction becomes an executed contract of sale, with warranty, as of the time when the goods are shipped.³ And to get at the real force of language which is alleged to have constituted an express verbal warranty, it is often important to picture the situation of the parties at the time, — their looks, their gestures, and the whole manner of the conversation, — not to trust to particular words alone.⁴ Nor is the oral contract of warranty necessarily confined to a single conversation: it may be gathered from the language and conduct of the parties at two or more interviews.⁵

In truth, there are no mysterious rules of interpretation to be applied to language which imports an express warranty; for the object is clearly to ascertain what the parties themselves had intended, as in other contracts. But the use of

¹ *Allen v. Pink*, 4 M. & W. 140; *Filkins v. Whyland*, 24 N. Y. 341; *Hildreth v. O'Brien*, 10 Allen, 104; *Hersom v. Henderson*, 21 N. H. 224.

² *Chapman v. Searle*, 3 Pick. 38; *Goodyear v. Ogden*, 4 Hill, 104. And see *Story Sales*, §§ 358-360.

³ *Foot v. Bentley*, 44 N. Y. 166.

⁴ See *Horton v. Green*, 66 N. C. 596.

⁵ *Pinney v. Andrus*, 41 Vt. 631.

loose and ambiguous expressions, or the awkward collocation of words in a sentence, may render this mutual intention a matter of much perplexity. More particularly is this true where the alleged warranty was expressed in writing. Thus, if a picture be expressly offered for sale as the work of a certain great master, the inducement to the purchase is found to be, with the generality of mankind, not so much the intrinsic merit of the work of art, as the reputation of the artist; and the question arises, whether such an advertisement, or the written description of the work as done by a certain artist, shall be deemed an express warranty that the artist was that person and no one else. Two English cases appear to be at variance on this point, — one decided by Lord Kenyon, with reference to alleged works of Claude Lorraine and Teniers; and the other, tried before Lord Denman, concerning some views in Venice, which were catalogued under Canaletti's name.¹ In the former, it was held by the court that the genuineness of the painting as the work of that artist was merely an expression of opinion; but in the latter the jury were allowed to decide, whether, upon the facts, an express warranty in this respect was intended. But Lorraine and Teniers preceded Canaletti by nearly a century; and Lord Denman suggests, as a fair ground of distinction between the two cases, that it is possible to make proof as a matter of fact where the work is by a modern artist, but that, in the case of very old painters, such assertions are necessarily a matter of opinion.²

Various similar examples of uncertainty in expression might be adduced under the head of express warranty. In *Mallan v. Radloff*, soap-frames were bought, which the contract warranted to be "new frames, with all nuts and bolts complete and perfect." Upon the facts shown, and with full regard to

¹ *Jendwine v. Slade*, 2 Esp. 572; *Power v. Barham*, 4 Ad. & E. 473. And see *Lomi v. Tucker*, 4 C. & P. 15; *Story Sales*, § 358.

² Lord Denman, C. J., in *Power v. Barham*, *supra*.

the intention of the parties, it was decided that the seller was liable on his express warranty, where it proved that, though the frames were new, and had the proper number of nuts and bolts, they were not reasonably fit for the purpose of making soap. The court appears to have laid considerable stress on the use of the word "perfect" in the above stipulation.¹ So the use of appropriate descriptive words has been held to involve an express warranty of quality in numerous instances, though clear language expressive of obligation was wanting. Descriptive words themselves admit of explanation. Thus, the sale of "fair merchantable sassafras wood" may be shown to have meant in the contract, not any part of the timber of the sassafras tree, but sassafras roots.² And where the seller of "mess pork of Scott & Co." attempted to evade his responsibility by showing that the pork delivered by him was really *consigned* to him by Scott & Co., the court admitted proof to show, that, by a trade usage contemplated by the parties, the expression applied only to mess pork of Scott & Co.'s manufacture.³ The marked difference in value of the articles, according to the interpretation applied, is an important element for consideration. On the other hand, the words "say about" a designated number, and similar expressions, do not constitute a warranty as to quantity, but are words of expectation and estimate only.⁴ And mackerel warranted as being No. 1, No. 2, and so on, may be explained by reference to inspection laws which the parties must have mutually taken into account, to mean, not mackerel absolutely of that quality, but mackerel so branded by the inspector.⁵

¹ *Mallan v. Radloff*, 17 C. B. N. S. 588. But as to an implied warranty of fitness, see *infra*.

² *Tye v. Fynmore*, 3 Camp. 462; *Henshaw v. Robins*, 9 Met. 83; *Gunther v. Atwell*, 19 Md. 157. See, as to implied warranty, *infra*.

³ *Powell v. Horton*, 2 Bing. N. C. 668.

⁴ *McConnel v. Murphy*, L. R. 5 P. C. 203.

⁵ *Winsor v. Lombard*, 18 Pick. 57.

A peculiar instance of express warranty is furnished by a recent English decision. The defendant bought of the plaintiffs, at a certain price, specific bales of wool, "to arrive *ex* 'Stige' or any vessel they may be transshipped in, and subject to the wool not being sold in New York," &c.; the wool "to be guaranteed about similar to samples in P. & R.'s possession;" and, if any dispute arises, it shall be decided by the selling brokers, whose decision "shall be final." The wool turned out not to be "about similar to samples;" and the selling brokers, upon the defendant's protest, awarded that the defendant should take it at a certain abatement. It was decided that the guaranty was not in the nature of a condition, but only a warranty; that, under the contract, the brokers had power to award as they had done; and that the defendant was bound to take the wool accordingly at the abatement.¹ The dispute here was over the quality of goods, which were nevertheless of the very kind contracted for.²

The favorite application of the law of express warranty in the courts is to sales of animals, horse-sales especially,—a class of transactions which is found, both in England and America, peculiarly open to the suspicion of trickery and fraudulent concealment on the part of the seller. Now, where a buyer, in order to guard himself against imposition, takes an express warranty of the animal's soundness from the seller or auctioneer, to what purport is the term "soundness"? This will depend largely upon the circumstances of the case, and upon such local usages as manifestly entered into the mutual contract. But the buyer's rights under such a warranty are clearly though cautiously stated by Parke, B., as follows: "I have always considered that a man who buys a horse warranted sound, must be taken as buying him for

¹ Heyworth *v.* Hutchinson, L. R. 2 Q. B. 447.

² Cf. Azémar *v.* Casella, L. R. 2 C. P. 677, which is thus distinguished.

immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has either from disease or accident undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound."¹ This statement of the law, pronounced upon mature deliberation and with reference to the best of the earlier authorities, appears to have been accepted in England, to this day, as the standard of soundness.² Such a test manifestly takes into account a disorder which actually impairs the animal's natural usefulness at the time, or, as it has since been said, renders the animal "less than reasonably fit for present use;"³ and hence the rule favors the buyer more greatly than that previously laid down by Judge Coleridge, which must now be considered as obsolete; namely, that the question on such a warranty is, whether the animal had upon him a disease calculated *permanently* to render him unfit for use, or *permanently* to diminish his usefulness.⁴ The American cases appear disposed to take the same view of "soundness," — as something to be tested by the animal's reasonable fitness for present use.⁵

But this doctrine of warranted soundness does not appear

¹ Parke, B., in *Coates v. Stevens*, 2 Moo. & Rob. 157; and *Kiddell v. Burnard*, 9 M. & W. 668.

² Benj. Sales, bk. 4, pt. 2, c. 1, § 1; *Kiddell v. Burnard*, *supra*; *Holliday v. Morgan*, 1 E. & E. 1.

³ Hill, J., in *Holliday v. Morgan*, 1 E. & E. 1.

⁴ Coleridge, J., in *Bolden v. Brogden*, 2 Moo. & R. 113.

⁵ See *Roberts v. Jenkins*, 21 N. H. 116; *Schurtz v. Kleinmeyer*, 36 Iowa, 392; cases *infra*.

to extend to a merely temporary and curable injury, which exists at the date of sale, and does not really disqualify the animal for present service;¹ as where the animal has sustained a slight injury to the hock, and no deceit was practised.¹ So a bill of sale, acknowledging receipt of the price for a certain horse "considered sound," is held not to import a warranty of soundness.² Nor should the language of an express warranty be stretched beyond its reasonable significance by implication. Thus, the sale of a horse described in a receipt as "a gray, four-year-old colt, warranted sound in every respect," contains a warranty of soundness only, and not of age besides; and so with expressions as to the animal's breed, previous use, and the like, which, if designed to amount to express warranty in those particulars, should have been more precisely worded.³ If, again, the seller qualifies his warranty in any respect, the qualification, of course, takes effect with the warranty, of which a common instance may be seen in the sale of a horse "warranted sound for one month;" such a warranty properly limiting the seller's responsibility to such faults as the buyer might point out within the month, and not extending to defects discovered later, though possibly existing at the time of sale.⁴

Other expressions than "soundness" are frequently used. There may be a warranty of age; and a representation that an animal is so many years old, made under circumstances importing an express warranty, implies that the animal is no older.⁵ Or the animal may be warranted "sound and right," "sound and kind," "sound and perfect," "all

¹ *Roberts v. Jenkins*, 21 N. H. 116; *Bigelow, C. J.*, in *Brown v. Bigelow*, 10 Allen, 242.

² *Wason v. Rowe*, 16 Vt. 525.

³ *Budd v. Fairman*, 8 Bing. 48; *Richardson v. Brown*, 1 Bing. 344; *Willard v. Stevens*, 24 N. H. 271.

⁴ *Chapman v. Gwyther*, L. R. 1 Q. B. 464; *Bywater v. Richardson*, 1 Ad. & E. 508.

⁵ *Burge v. Stroberg*, 42 Geo. 88.

right in every respect." and so on, — phrases whose construction should be according to their natural import. To warrant a horse "sound and right" includes the idea that the horse is well-behaved; and any such phrases as the foregoing would seem, in substance, to superadd a warranty of good character to that of good physical condition. But it would always be a fair inquiry how far vicious behavior on a horse's part was directly traceable to bodily unsoundness.¹ It appears that the special warranty of a mare as "all right in every shape" for a certain business, or even a general warranty of her soundness, does not protect the buyer against the consequences of the animal's pregnancy.² The warranty that a horse is "well broke" might include a warranty of "gentleness," as the greater includes the less; but it does not imply that the animal has received any particular training.³ Whatever the phrase employed, an express warranty touching an animal's character or state of health does not exact from the seller the use of particular words, but is inferable from the general conduct and conversation of the parties in concluding the sale, or the writing given, and may thus be set up against a seller who has never distinctly used the word "warrant" at all.⁴

If the seller's express warranty be to the point that the animal was fit for use in a certain manner which the purchase contemplated, he is liable accordingly, even if the animal proves sound and right in other respects; as in the purchase of a horse expressly for use in the harness, but quite unsuitable therefor, though a good saddle-horse.⁵ But such a warranty should rest upon the seller's special undertaking: for when a specific horse is sold, and warranted, moreover, in

¹ *Walker v. Hoisington*, 43 Vt. 608.

² *Whitney v. Taylor*, 54 Barb. 536; *Brown v. Bigelow*, 10 Allen, 242.

³ *Bodurtha v. Phelon*, 2 Allen, 347.

⁴ *Cook v. Mosely*, 13 Wend. 277.

⁵ *Smith v. Justice*, 13 Wis. 600.

general terms, the seller is not understood to guarantee any education, or that the horse has been taught to do one thing more than another; for which reason the careful purchaser of a full-grown animal will see that the other party meets him clearly on special points before the bargain is concluded.¹

Whether a general warranty of the animal's soundness and character shall be construed to cover defects which the buyer saw, or might by inspection have seen, at the time of the sale, appears to be a matter of proof in each case; with the presumption in the seller's favor, and mutual intention as the general aim of the investigation. A general warranty of this kind is usually held not to extend to defects patent or obvious; but the doctrine is not inflexible, for it rests on the reasonable presumption that the parties could not have intended the warranty to apply to any defect causing unsoundness, which both parties saw and appreciated at the time of the sale; and the presumption is liable to be overcome.² Hence, in *Brown v. Bigelow*, it was held, in accordance with the facts, that the seller's express warranty of soundness was available to the buyer, where the horse proved permanently lame; and this notwithstanding the purchaser knew he was lame a week before the sale, and talked on the subject with the seller, who at first refused to give the warranty.³ So, in *Liddard v. Kain*, the buyer's knowledge of the disorder which rendered the horses unfit for work did not prevent him from recovering for breach of the seller's warranty (which was grounded apparently upon this mutual admission of unfitness) to deliver the horses at the end of a fortnight sound and free from blem-

¹ See *Bodurtha v. Phelon*, 2 Allen, 347.

² *Bigelow*, C. J., in *Brown v. Bigelow*, 10 Allen, 242. And see *Benj. Sales*, bk. 4, pt. 2, c. 1, § 1; *Mulvany v. Rosenberger*, 18 Penn. St. 203; *Liddard v. Kain*, 2 Bing. 183; *Margetson v. Wright*, 7 Bing. 603; 8 Bing. 454; *Chadsey v. Greene*, 24 Conn. 562.

³ *Brown v. Bigelow*, *ib.*

ish.¹ For it must be admitted, the buyer's knowledge that a defect exists does not necessarily involve the means of ascertaining how long the disability may last, or how far it may prove incurable ; and where, as in the case of a horse suffering from lameness or a distemper, the party concludes to purchase, the very object for which he takes an express warranty will most likely be to indemnify himself in case the animal's disability proves incurable and permanent. The older books, it is true, laid down the law with somewhat more reserve ; taking the stand-point that suits on warranty are grounded on a supposed deceit, and that the seller cannot have meant to deceive the buyer as to faults which were open to the latter's inspection. Express warranty, however, is essentially a matter of bargain, of mutual understanding, of common consent ; and that a seller may insure the buyer against the most obvious and patent defects in the subject-matter of sale, if he choose, is now unquestionable law.²

But, once more, against defects not readily discoverable, nor in fact perceived by the buyer at the sale, the seller's express warranty, couched in general language, is available for the buyer's protection ; and where the defect was well known to the seller, and he used art in concealing it from the buyer, he ought all the more, for his fraud and deceit, to be held responsible for the consequences.³

Among the defects which have been held to constitute unsoundness under the general warranty in horse sales, the text-books enumerate these : organic defects, such as that a horse had been nerved ; bone spavin of the hock ; and ossification of the cartilages.⁴ Crib-biting has been declared to come

¹ *Liddard v. Kain*, 2 Bing. 183.

² See *Tindal, C. J.*, in *Margetson v. Wright*, 7 Bing. 603 ; 8 Bing. 454 ; *Pinney v. Andrus*, 41 Vt. 631.

³ *Chadsey v. Greene*, 24 Conn. 562 ; *Hadley v. Clinton, &c. Co.*, 13 Ohio, N. S. 502.

⁴ *Benj. Sales*, bk. 4, pt. 2, c. 1, § 1 ; *Oliphant Horses*, 224-229.

in only under a warranty against vices;¹ but, on the other hand, it is pronounced unsoundness, where shown to affect the general health and condition of the horse.² Vicious tricks have sometimes been traced to congenital defects; as, for instance, the habit of shying, when owing to a malformation of the eye which causes imperfect vision; and such a case comes fairly under the head of unsoundness.³ A warranty of soundness does not strictly cover mere badness of shape, the animal being sound when sold; not even, as it would seem, though the misshape tends to produce unsoundness.⁴ But if the seeds of disease be shown to have been in the animal at the time of the sale, which afterwards developed into full disability, there is unsoundness within the general meaning of the warranty.⁵ On the whole, it is not safe to rely upon precedents in this respect; much must depend upon the facts of any given case; and so subtle is the connection between conduct and physical condition in dumb animals, and so necessarily imperfect are our sources of information as to their infirmities, that one who would read his warranty understandingly should take medical as well as legal advice.

(2.) As to implied warranty. This important topic may be subdivided, for our present purpose, into implied warranty of quality and implied warranty of title. It is with reference to this doctrine of implied warranty in sales, and particularly as to implied warranty of quality, that the courts are found in crooked channels without a pilot. The *dicta* of the cases are not to be reconciled, whatever hypothesis may be framed for harmonizing the great mass of decisions.

¹ Scholefield v. Robb, 2 Moo. & Rob. 210.

² Washburn v. Cuddihy, 8 Gray, 430. See also Dean v. Morey, 33 Iowa, 120; Walker v. Hoisington, 43 Vt. 608.

³ Holliday v. Morgan, 1 E. & E. 1.

⁴ See Brown v. Elkington, 8 M. & W. 132; Benj. Sales, bk. 4, pt. 2, c. 1, § 1.

⁵ Woodbury v. Robbins, 10 Cush. 520; Kiddell v. Burnard, 9 M. & W. 668.

First, then, concerning the implied warranty of quality in sales of personal property. The fundamental maxim is, *caveat emptor*; in other words, let the buyer look out for himself that what he buys has all the qualities and answers all the purposes for which he chose it; since the seller assumes no such responsibility. It is admitted, therefore, that no nice sense of honor, no ethical consideration, is to influence the courts in construing such contracts; and the buyer, knowing the length of a seller's tether, must either purchase with his eyes open, or risk the consequences of his over-confidence. For, if he wants protection, he should insist upon an express warranty before closing the bargain. But here the courts have not rested. With a commendable spirit of justice, they have long sought to mitigate the harshness of a rule, which, if allowed free operation, would give the sharpest-witted constantly the upper hand; and hence come various modifications, — one exception to *caveat emptor*, where the seller is guilty of fraud; the other, where the circumstances might justify a court in saying that warranty was necessarily implied. When, in addition to these exceptions, we recall from the foregoing pages that even an express warranty may frequently be inferred from the seller's language held forth at the sale, his conduct, and the attendant circumstances, without ever a precise undertaking, in so many words, to warrant the goods he offers, or any thing more distinct than a statement by way of inducement which the buyer has relied upon, we may well conclude that this rule of *caveat emptor* doubles upon itself; indeed, between court and jury, it has come to be applied flexibly, so as to satisfy the demands of substantial justice in each individual case.

Another source of confusion in dealing with the law of implied warranty is to be found in the circumstance, that the distinction between a condition of sale and a warranty is not

always clearly accepted in the courts, — a difficulty which was foreshadowed in the preceding chapter ; conditions precedent being treated by some judges as warranties, while others say that the distinction is of no moment. But the distinction is worth preserving, as will further appear when we come to the buyer's remedies ; and whoever would attain a clear comprehension of the contract of sales should discriminate accordingly. He should know that it is one thing, under a contract for "Manilla sugar," to deliver "New Orleans sugar," — which would be in reality an utter non-compliance with the terms of sale, — and another thing to deliver "Manilla sugar" of an inferior quality. That the subject-matter of a sale exists is sometimes said to be an implied warranty ; but it should rather be called a condition precedent, for it is of the essence of the sale, not a collateral undertaking.¹ To use the language of a modern text-writer: "A warranty, properly so called, can only exist where the subject-matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract, and is a collateral engagement that the specific thing so sold possesses certain qualities."²

Caveat emptor, a purely common-law doctrine, seems to have so far lost ground in modern times, that strictly good faith is exacted from the seller ; but beyond this the best English and American authorities do not profess to venture, except it be to the extent of guarding a buyer whose opportunities of inspecting the subject-matter have neither been fairly offered nor waived by him. The civil and common law are here at variance ; and the Roman doctrine, that a sound price of itself warrants a sound article, has no root in English jurisprudence : nor, indeed, could such a rule and that of *caveat emptor* possibly flourish together.³

¹ See *supra*, pp. 319, 320 ; Benj. Sales, bk. 4, pt. 2, c. 1, § 3.

² 2 Smith Lead. Cas. 33.

³ Story Sales, §§ 365, 370 ; *Mixer v. Colburn*, 11 Met. 559 ; *Mason v.*

Between ascertained specific chattels, and chattels which are not as yet fully ascertained, under a contract of sale, the line seems to be properly drawn at this day for admitting the principle of implied warranty; the circumstance that the chattel's situation has not admitted of inspection by the buyer bringing it into the latter category. As to a specific ascertained chattel already inspected, *caveat emptor* applies in full force;¹ yet, as we have already seen, not so completely as to exclude the possibility that a seller's statement of quality, which was offered to be acted upon, was taken by the buyer in that faith, and so constituted an express warranty;² nor, again, as we shall see hereafter, so as to permit a seller's fraud to enure to his own advantage against an unwilling buyer.³ But in the case of an unascertained chattel, or where a chattel is to be made or supplied to the purchaser's order, "there is," as Mr. Benjamin says, "an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given."⁴

As to a specific ascertained chattel, the rule of *caveat emptor* was early applied in *Chandelor v. Lopus*, where the bare affirmation that an article sold was a bezoar-stone, without expressly warranting it to be so, was held to furnish no cause of action; a case, however, which is too imperfectly reported to be a safe guide.⁵ Upon the sale of an ascertained article,

Chappell, 15 Gratt. 572; *Weimer v. Clement*, 37 Penn. St. 147. But see *Pease v. Sabin*, 38 Vt. 432.

¹ See *Mellor, J.*, in *Jones v. Just*, L. R. 3 Q. B. 197; *Benj. Sales*, bk. 4, pt. 2, c. 1, § 3; *Parkinson v. Lee*, 2 East, 314; *Hopkins v. Tanqueray*, 15 C. B. 130; *Frazier v. Harvey*, 34 Conn. 469; *Weimer v. Clement*, 37 Penn. St. 147; *Mixer v. Colburn*, 11 Met. 559; *Moses v. Mead*, 1 Denio, 378; *Deming v. Foster*, 42 N. H. 165.

² *Supra*, p. 334.

³ Illegal and fraudulent sales, *post*.

⁴ *Benj. Sales*, bk. 4, pt. 2, c. 1, § 3.

⁵ *Chandelor v. Lopus*, 2 Cro. Jac. 2; 1 Sm. Lead. Cas. 238.

such as a known machine, the component parts of which have been inspected by the buyer, there is, as it appears, *prima facie* no implied warranty that the thing shall prove fit for the purpose for which it professes to have been constructed ; certainly none, if the machine was in running order at the time of inspection.¹ So the sale of a specific boat, known on both sides to be old and in want of repair, implies no warranty of good quality.² Even for latent defects in the chattel sold, so long as the seller was guilty of no fraud, and knew as little of them as the buyer, the latter must suffer the consequences, unless he has taken an express warranty in his favor ; as where hogs, which were sold as specific chattels, prove to have had a disease at the time of sale, of which they all die soon after.³ And a certain yoke of oxen being bought upon inspection to do work upon a farm, it was held that there was no implied warranty in the sale that the oxen were fit for this work.⁴ But in all such cases as these it is found that the minds of the parties have so far met upon identical goods, that the buyer has either inspected for himself, or has had full opportunity to do so. Where this opportunity of inspection has, under the circumstances of the sale, been unreasonably denied him, or is as yet in abeyance or absolutely impossible, and the advantages of knowing the qualities of the thing are all with the seller, the courts, either on the imputation of a fraudulent purpose, or because they understand the mutual contract of the parties to have expressed or implied a warranty for the emergency, are found quite averse to applying the *caveat emptor* doctrine.⁵ Hence,

¹ See *Mallan v. Rudloff*, 17 C. B. N. s. 588.

² *Weimer v. Clement*, 37 Penn. St. 147.

³ *Parkinson v. Lee*, 2 East, 314 ; *Kingsbury v. Taylor*, 29 Me. 508 ; *Frazier v. Harvey*, 34 Conn. 469. And see *Lord v. Grow*, 39 Penn. St. 88 ; *Hadley v. Clinton, &c. Co.*, 13 Ohio, n. s. 502.

⁴ *Deming v. Foster*, 42 N. H. 165.

⁵ See *Beals v. Olinstead*, 24 Vt. 114 ; *Lord v. Grow*, 39 Penn. St. 88 ; *Pease v. Sabin*, 38 Vt. 432 ; *Newbery v. Wall*, 35 N. Y. Superior, 106.

too, is it said, that where lumber is sold, measuring a given number of feet, according to a scale already made by one employed by the seller and not the buyer, the sale carries with it an implied warranty, on the seller's part, that the scaler was competent and the scale honestly made, unless it clearly appears that the buyer agreed to assume that risk.¹ In short, there should be actual inspection by the buyer, or the opportunity of inspecting. As to specific goods *in esse* capable of inspection, therefore, "the buyer," as was said in *Jones v. Just*, in 1868, by Mellor, J., "has the opportunity of exercising his judgment upon the matter ; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may, if he chooses, require a warranty. In such a case, it is not an implied term of the contract of sale that the goods are of any particular quality, or are merchantable ;"² and as to an existing specific chattel, whose actual condition is equally open to the inspection of either party, there is no implied warranty of quality.³

To this head may be referred the sale of meat or provisions, as specific chattels already inspected by the buyer and selected. It has been held that the maxim of *caveat emptor* here applies, notwithstanding the article proves diseased and unfit for food, the fact not appearing on examination, and the seller not being aware of it ;⁴ for here the buyer purchases on his own judgment. But some have misapprehended the point in such cases, conceiving that provisions have some mysterious property to impart by way of warranty to the purchaser ; and an ambiguous statement of Blackstone, that

¹ *Ortman v. Green*, 26 Mich. 209.

² *Jones v. Just*, L. R. 3 Q. B. 197. In this opinion of Mellor, J., the English decisions are fully examined.

³ *Turner v. Mucklow*, 8 Jur. n. s. 870, explained in *Jones v. Just*, *supra* ; *Barr v. Gilson*, 3 M. & W. 390 ; *Frazier v. Harvey*, 34 Conn. 469.

⁴ *Emmert v. Matthews*, 7 H. & N. 586. And see *Burnby v. Bollett*, 16 M. & W. 644.

in contracts for provisions it is always implied that they are wholesome, is quoted in support of the theory.¹ The old authorities are carefully collected, however, in *Burnby v. Bollett*; and Mr. Benjamin reviews them, submitting the conclusion, that the responsibility of victuallers, butchers, and other common dealers in victuals (the only parties referred to in the old books), for selling unwholesome food, arises from no contract or implied warranty, but is a responsibility imposed by statute, that they shall make good any damage caused by their sale of unwholesome food.² In other words, there appears to have been ancient English legislation, — founded doubtless on sound considerations of the public health, and aided by the circumstance that such a seller can rarely put off unwholesome food upon his customers without being aware of it himself, or else grossly negligent, — which imposed special duties upon these retailers of food. To the same purpose Parke, B., reasoned, in *Burnby v. Bollett*.³ In America the courts of several States have pointedly refused to infer a warranty of quality from contracts for the sale of specific wholesale provisions, or of live animals as articles of merchandise, notwithstanding the ultimate destination of the thing, for domestic consumption; though they further intimate that the rule would be otherwise in the retail sale of provisions or meat directly to the consumer.⁴ It would seem to be best, on the whole, to let the ordinary maxim of *caveat emptor* apply to all sales of specific articles ultimately destined for food, if actually inspected by the buyer, and taken upon his

¹ 3 Bl. Com. 166.

² Benj. Sales, bk. 4, pt. 2, c. 1, § 3.

³ *Burnby v. Bollett*, 16 M. & W. 644. And see *Goad v. Johnson*, 6 Heisk. 340.

⁴ *Winsor v. Lombard*, 18 Pick. 62; *Howard v. Emerson*, 110 Mass. 320; *Moses v. Mead*, 1 Denio, 378; s. c. 5 Denio, 617; *Goad v. Johnson*, 6 Heisk. 340. Mr. Story says, that, as to the sale of provisions for immediate domestic use and consumption, such a warranty is necessary for the preservation of health and life. Story Sales, § 373.

own judgment, — due regard being paid to the effect of the above legislation, or of modern local acts, in enlarging the liability of common dealers of food beyond the usual legal exceptions to the maxim; but in the sale of such articles when unascertained, and not inspected by the buyer, who has been obliged to rely upon the seller's judgment, to give operation to that implied warranty of fitness which appertains to all other chattels similarly situated.¹

We next come to what are called sales by description. The proposition is sometimes put forth, that, on the sale of a chattel as being of a particular kind or description, a contract is implied that the article sold is of that kind or description.² But what is a sale by description? If I sell a specific chattel, — say, a ready-made carriage, which the buyer has chosen, — and then send it to his house accompanied by some bill or writing made out by way of receipt or voucher, which describes the carriage after some sort, this is no sale by description under any such rule of implied contract, but rather the sale of a specific identified thing, accompanied by a written description, whose language may or may not, under the circumstances, evince the intent to give an express warranty on the points covered. The description is only incidental to the bargain. But if I am to sell a chattel as yet unascertained by the buyer, something for supply from a lot or for manufacture to order, — such as one of a lot of ready-made carriages of a certain kind and quality not selected, or a carriage to be made after a particular pattern, — this rule of an implied contract takes effect, and the sale is purely by description. And further: even the sale of a specific thing implies that the thing to be delivered is the article contracted for, and that the article contracted for is genuine, and not a clever imita-

¹ See *Bigge v. Parkinson*, 7 H. & N. 955.

² See *Wolcott v. Mount*, 7 Vroom, 262, citing *Barr v. Gilson*, 3 M. & W. 390; *Henshaw v. Robins*, 9 Met. 83; *Borrekins v. Bevan*, 3 Rawle, 23.

tion. But once more: what is here meant by an "implied contract"? The phrase is ambiguous, and suggests a practical legal difficulty; namely, that of determining, from the conflicting cases, whether the undertaking thus implied on the seller's part is an implied warranty or an implied condition precedent. We hold that the true principle to be extracted from the best authorities is, that, so far as concerns the identity or genuineness of the chattel as answering the description in kind and character, there is a condition precedent resting upon the seller to furnish the very thing; but that, as to quality and other collateral matters involved in the contract, the want of correspondence with the description is to be discussed under the law of warranty. Thus it would be a condition precedent on the seller's part, in the case above supposed, to furnish a carriage, and, further, a carriage of the particular kind ordered; but hardly so as to incidental matters of description, such as soundness or running qualities.¹

Some of the important cases involving description may now be stated. In *Azémar v. Casella* it was clearly ruled, in the sale of cotton by description, that the buyer need not receive the goods sent him, inasmuch as there was not a difference of quality merely, but a difference of kind. There was no sale in fact.² In *Josling v. Kingsford*, the contract was for "oxalic acid," and the seller was accordingly held bound to deliver an article of that kind, although he had exhibited the bulk of the article sold to the buyer, and written to him that he would not warrant its strength, and suggested a fresh examination on the buyer's part. Here was a condition precedent to deliver the genuine thing contemplated by the contract.³ *Nichols v. Godts* described a sale as of "foreign rape-oil, warranted only equal to samples;" but, notwithstanding the oil

¹ See *supra*, p. 319; Benj. Sales, bk. 4, pt. 2, c. 1, § 3; cases *infra*.

² *Azémar v. Casella*, L. R. 2 C. P. 431.

³ *Josling v. Kingsford*, 13 C. B. N. s. 447.

tendered actually corresponded with the sample, the case showed a failure of the condition precedent to furnish "foreign rape-oil;" and Pollock, C. B., rightly said, "If a man contracts to buy a thing, he ought not to have something else delivered to him."¹ So in the sale of turnip-seed described as "Skirving's Swedes," it was ruled that the contract was not fulfilled by the tender of any other turnip-seed, for there was something more than a warranty of the quality of turnip-seed involved in the contract.² *Bannerman v. White*, which followed the same principle of a condition precedent, was an extreme case, where the facts showed that what might, in most transactions of the kind, have amounted to a merely collateral undertaking, was understood by the parties as vital and conditional to the sale; and the sale not being of hops, accompanied by a representation that sulphur was not used in growing them, — which stipulation would have amounted to an express warranty, — but of what one might describe as "unsulphured hops," the only kind contemplated by the contract, the seller, in furnishing sulphured hops, was held to have left his condition unfulfilled, so that he could not enforce the sale; and this notwithstanding the delivery corresponded with samples.³

But it is not always easy to distinguish matter of description which forms a vital and an integral part of the contract of sale from that which is collateral and involves a warranty only. The same attribute of a subject-matter, it is seen, may be in one transaction an essential part of the description, in another a non-essential, according to circumstances. It is not

¹ *Chanter v. Hopkins*, 4 M. & W. 339.

² *Allan v. Lake*, 18 Q. B. 560. See *Wolcott v. Mount*, 7 Vroom, 262; *Lord v. Grow*, 39 Penn. St. 88.

³ *Bannerman v. White*, 10 C. B. N. s. 844. And see *Shepherd v. Kain*, 5 B. & Ald. 240; *Taylor v. Bullen*, 5 Ex. 779; *Benj. Sales*, bk. 4, pt. 1, bk. 4, pt. 2, c. 1, § 3; *Story Sales*, § 377; *Lamb v. Crafts*, 12 Met. 355; *Beals v. Olmstead*, 24 Vt. 114; *Dutchess Co. v. Harding*, 49 N. Y. 321.

literal, but substantial fulfilment, that the law exacts from any party. Thus the sale of chattels of a peculiar brand, such as "S. & H.," requires delivery of goods known in the market by that designation; but if the brand has meantime been changed by the makers to "H. & Co.," and the variation of letters is of no consequence to the buyer, the delivery of "H. & Co." goods fulfils the condition by conforming with the description as rationally understood.¹ Again: a contract for "horn chains" (no particular quality being mentioned) is supplied under its natural interpretation by the market article answering that description; and if chains composed partly of horn and partly of hoof are merchantable as "horn chains," the contract is fulfilled by supplying them.² Where, too, an article is bought by description of a place, such as "Manilla sugar" or "Calcutta linseed," the leading test is whether the article delivered has that distinctive character in commerce; and if it be not so adulterated as to be unsalable by that description, but is the identical kind, though of a poor quality, the buyer's remedy, if he have any, must be under a warranty; he cannot repudiate the sale.³ Yet the delivery of an article sold as "indigo," which is not that article in fact, but only a skilful imitation, has been regarded as no fulfilment of a contract of sale which calls for "indigo," where the buyer meant to bargain for the genuine article, and nothing spurious.⁴

Whether, then, it be said that there is a "condition precedent," or an "implied warranty," or an "implied contract," in these sales by description, to justify the buyer in refusing to take chattels essentially different from those called for, there

¹ *Hopkins v. Hitchcock*, 14 C. B. n. s. 65.

² *Swett v. Shumway*, 102 Mass. 365.

³ *Wieler v. Schilizzi*, 17 C. B. 619; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331.

⁴ *Henshaw v. Robins*, 9 Met. 87. See *Taylor v. Bullen*, 5 Ex. 779.

can be no doubt that he may so refuse to take them, provided the circumstances were such that the buyer had necessarily trusted to the seller's judgment, and not his own. But how far descriptive language shall in a given case be construed as of the essence of the contract, is a matter for proof, resting ultimately upon the mutual intent of the parties, and more immediately as a matter of common justice upon the familiar mercantile significance of the terms they have employed.

A singular example of the force of descriptive language appears in *Barr v. Gilson*, where two parties had entered into an ordinary bargain and sale concerning a specific "ship" called the *Sarah*, not present for the inspection of either buyer or seller. It turned out afterwards that the ship, which was known to have been on a distant voyage, had got stranded on an island a few days before the sale, and was almost ruined at the date of the bargain. The terms of the sale made no reference to the existing quality of the ship; but the written instrument described the subject-matter as a "ship." On a rule to set aside a verdict given for the buyer, it was held that the sale here of a chattel described as a "ship" implied that the timber and materials existed in the character of a "ship" at the time of the sale, but did not imply that the ship was seaworthy or in a serviceable condition; and a new trial was accordingly ordered.¹ It is worth observing, that in this sale nothing had been left to the seller's judgment or selection: the sale was of an existing specific thing, whose present qualities were as capable of being ascertained by one party as the other; or rather were ascertainable by neither, in fact. The result is, that the buyer must bear the consequences of his own imprudence, if he engages to give a sound price for a chattel whose existing condition is necessarily a matter of conjecture on both sides; the more so when its situation, like that of any ship on a

¹ *Barr v. Gilson*, 3 M. & W. 390.

voyage, is one involving extraordinary risk of damage and destruction. But now to contrast this case with *Merriam v. Field*, lately decided in one of our Western States. A lot of lumber, sold by the manufacturer to a lumber merchant, was at the time of the sale in rafts, and incapable of inspection by either party. The court held that the sale implied a warranty that the lumber was merchantable.¹ If this view was correct, it must have been for one of these two reasons,—*first*, that there was evidence presented of some oral statement by the seller which amounted to an express warranty of present quality on his part; or, *second*, that the sale was not absolutely of a specific lot as it stood, but rather of unascertained chattels by description, as to whose quality the buyer necessarily trusted to the manufacturer, not having had the opportunity of inspecting for his own satisfaction. For, had the bargain been for this lot of timber, as for the particular ship above referred to, or any other specific chattel, in a distant place, *caveat emptor* should have closed the mouth of a buyer who knew that the present condition of the subject-matter must be uncertain, and yet demanded no special warranty. But, once more, contrasting these two cases, the character of the subject-matter might suggest a possible difference: for a ship, a horse, and many other chattels, may plainly exist *in specie*, and be salable, though more or less damaged or diseased; whereas a lot of lumber does not easily suffer injury, save through the utter destruction of the whole or a specific part; and the bargain for a thing which proves to have been at the time destroyed wholly, or perhaps only in substantial part, will fail for want of an adequate subject-matter, as we have elsewhere seen.² Very closely, then, do these distinctions run in the law of sales.

In the sale of chattels by description there is more involved than the condition precedent (or warranty, or implied con-

¹ *Merriam v. Field*, 24 Wis. 640.

² See *supra*, p. 191.

tract, as some would say) which we have noticed. So long, in fact, as the buyer has not had the opportunity of inspection, but trusts necessarily to the seller's judgment, whether the seller be dealer or manufacturer, the contract for unascertained chattels carries with it an implied warranty that they are salable or merchantable under their description; and if ordered for a certain described purpose, the warranty is further enlarged, so as to imply on the part of the manufacturer or dealer that they shall be reasonably fit for that purpose. This warranty, for the buyer's benefit, is founded in the reliance which he has been obliged to place upon the seller under the circumstances, and is a reasonable inference of law from the nature of the contract. Thus, as Lord Ellenborough first put the rule in the sale of twelve bags of "waste silk:" "Under such circumstances the purchaser has a right to expect a salable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them."¹ And Mellor, J., has recently set forth the English doctrine in the not uncommon form of two abstract propositions: (1.) "Where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article." (2.) "Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer,

¹ Gardiner v. Gray, 4 Camp. 144.

there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied.”¹ The doctrine appears to have been enforced with express reference to manufacturers; but it is not to be restricted to such persons, but may apply, upon a proper state of facts, to any person who sells.²

Instances where this warranty of merchantable quality, or of fitness for the designated purpose, has been inferred and enforced, are quite common; as in the sale of merchandise, which the buyer ordered for shipment to a particular market, or for use under circumstances necessarily requiring an article of that peculiar quality to be merchantable;³ and where machines are to be delivered suitable for certain work.⁴ If an article so supplied to order fails to serve its designated purpose as a whole, it cannot avail the maker or dealer that the ingredients or component parts fulfil the implied warranty of fitness.⁵

But the implied warranty of merchantable quality is limited in time to the period while the goods are in the seller's

¹ Mellor, J., in *Jones v. Just*, L. R. 3 Q. B. 197, setting forth these with various other propositions. And see *Story Sales*, §§ 368, 371; *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533; *Benj. Sales*, bk. 4, pt. 2, c. 1, § 3; *Hamilton v. Ganyard*, 3 Keyes, 45; *Rodgers v. Niles*, 11 Ohio St. 48; *Mann v. Everston*, 32 Ind. 355; *Pease v. Sabin*, 38 Vt. 432; *Brown v. Murphee*, 31 Miss. 91; *Merriam v. Field*, 24 Wis. 640; *Lespard v. Van Kirk*, 27 Wis. 152; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *French v. Vining*, 102 Mass. 135; *Sims v. Howell*, 49 Geo. 620; *McKlung v. Kelley*, 21 Iowa, 508. In *Bigge v. Parkinson*, 7 H. & N. 955, this rule is applied to a sale of provisions.

² *Ib.*; *Story Sales*, § 368; *Brown v. Edgington*, 2 M. & G. 279.

³ *Jones v. Just*, L. R. 3 Q. B. 197; *Mann v. Everston*, 32 Ind. 355; *Lespard v. Van Kirk*, 27 Wis. 157; *Pease v. Sabin*, 38 Vt. 432.

⁴ *Jones v. Bright*, 5 Bing. 533; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Brown v. Murphee*, 31 Miss. 91; *Rodgers v. Niles*, 11 Ohio St. 48.

⁵ *Mallan v. Radloff*, 17 C. B. N. s. 588; *Sims v. Howell*, 49 Geo. 620. But cf. *Sims v. Howell* (a case of a fertilizer) with *Mason v. Chappell*, 15 Gratt. 572.

possession, and does not ordinarily extend to the time of their arrival at their destination. A warranty that the chattel shall continue of merchantable quality during the transit, or for any length of time after they leave his own control, should be expressly given on the seller's part, in order to bind him.¹ Nor, once more, would this implied warranty necessarily extend to the cask or other receptacle which contained the subject-matter; so as, for instance, to make the seller of merchantable oil liable by implication for the merchantable quality of the oil-casks besides.² But the fitness of the receptacle, or the general quality of the subject-matter, at the termination of the transit, or at any other period, may have an important bearing upon the vital issue in such cases; namely, whether, when the sale took full effect so as to pass property and risks to the purchaser, the subject-matter was in a merchantable condition. A seller who ships suitable oil may not be responsible for such deterioration as naturally results from the voyage; but if the oil reaches the buyer materially injured in consequence of being put up in unsuitable casks, or if its spoiled condition evinces that it was not of proper quality in the first place, the result must be different. The decision in *Jones v. Just*, where the whole doctrine of implied warranty is so learnedly set forth, really confirms these views, though the facts as reported might perhaps, at first glance, give a contrary impression. Here the contract was for a quantity of Manilla hemp, to arrive from abroad by certain ships. The ships arrived, and the hemp was delivered and paid for. The buyer, having had no earlier opportunity of inspection, now found that the bales had been wetted through with salt water, afterwards unpacked and dried, and then repacked and shipped from the agreed place of export. The hemp retained its character of hemp, but was

¹ *Bull v. Robison*, 10 Ex. 342; *Leggat v. Sands' Ale, &c. Co.*, 60 Ill. 158; *Mann v. Everston*, 32 Ind. 355.

² *Gower v. Van Dedalzen*, 3 Bing. N. C. 717.

so damaged as not to be "merchantable." The court ruled that the buyer could recover damages on an implied warranty that the goods should be salable or merchantable under their description.¹ It will be noted that the damage complained of affected the goods, in point of fact, before they were put upon their transit; also that the method of packing bore upon the merchantable quality of the subject-matter bargained for.

But the warranty of merchantable quality or fitness for a designated purpose is only implied so far as the described thing is ordered under circumstances showing that the buyer does not mean to rely upon his own judgment in estimating its qualities; and hence, wherever a special, known, described, and definite thing is ordered from the dealer or manufacturer, and he accordingly furnishes that particular thing, or, in other words, a merchantable chattel of the kind called for, it is the buyer's misfortune if that kind of chattel prove unsalable, or unfit for a particular purpose which the buyer had in mind: for the doctrine of implied warranty does not reach the case. This distinction may seem subtle, but it is logical. Thus, if I expressly order twelve sewing-machines, of some pattern suitable for stitching leather, the seller is bound to furnish machines which will do such work; but if I order "twelve H machines, No. 2," intending to sell or use them for stitching leather, it is enough that twelve machines merchantable under the description are supplied, their fitness for leather-stitching being no element of the implied undertaking on the seller's part. Such is the exception to implied warranty which numerous decisions justify.² It is also

¹ *Jones v. Just*, L. R. 3 Q. B. 197. See *Cushman v. Holyoke*, 34 Me. 289.

² *Jones v. Just*, *supra*, per Mellor, J.; *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Hyatt v. Boyle*, 5 Gill & J. 110; *Deming v. Foster*, 42 N. H. 165; *Port Carbon Iron Co. v. Groves*, 68 Penn. St. 149; *Story Sales*, § 372; *Mason v. Chappell*, 15 Gratt. 572; *Benj. Sales*, bk. 4, pt. 2, c. 1, § 3.

held, in a case of sale by description, that the warranty which the law usually implies, because the buyer has had no opportunity to inspect the goods, does not extend to cases where the buyer might have inspected, though it would have been inconvenient to do so.¹ The fact, therefore, that the seller knew of the purpose to which the chattel was to be applied by the buyer, does not commit him to an implied warranty of its fitness for the purpose; the real difficulty being, however, that a purpose which is distinctly made known in ordering unascertained goods might often, by construction of the whole bargain, be pronounced an essential part of the description, or held to involve the dealer, who went right on to fulfil the order, without demurring as to the chattel's fitness for such purpose in an express warranty of fitness. On such shifting ground, after all, does *caveat emptor* rest.

Shepherd v. Pybus is a somewhat peculiar case, which appears to come within the rule of implied warranty as to merchantable condition. The builder sold a barge which was afloat, but not completely rigged and finished. It was ruled, that, inasmuch as the buyer had only inspected the chattel when it was built, and not while it was being built, there was an implied warranty of the chattel's reasonable fitness as an ordinary barge. But it was further held, as the buyer had given no distinct notice to the builder of the purpose for which he meant to use the barge, that there was in the sale no warranty implied of its fitness for the particular purpose he had contemplated. The *animus* of the decision was, that in the former respect the buyer had relied upon the seller's skill and judgment, but not in the latter.²

We now come to implied warranty of quality in sales by sample. And here let us ask, What is a sale by sample? For this phrase is often used without a clear idea what it signifies; whence ensues confusion. If one inspects goods for himself,

¹ *Hyatt v. Boyle*, 5 Gill & J. 110.

² *Shepherd v. Pybus*, 3 M. & G. 868.

and purchases them specifically, the fact that the seller had shown him a sample to aid him in forming his judgment, or by way of an inducement, does not change what would plainly have been an ordinary sale, with or without an express warranty of quality, into a sale by sample: but, where the contract of sale is made solely with reference to some sample exhibited which is taken by mutual assent of the parties to show the actual quality of a bulk bargained for, the buyer's reliance as to quality rests, not upon his own judgment or opportunity for present inspection, but upon the faith of the seller's special undertaking that a bulk shall be furnished corresponding with the sample shown; and this constitutes a sale by sample.¹ A sample sale then, properly speaking, takes effect upon examination of the sample only; though if sample examination be the pivot of the transaction, as shown by the evidence, the distinctive character of the sale may continue, notwithstanding the further circumstance that the chattels in bulk were where the buyer might have inspected them, or that the sample was drawn by the seller from the bulk in the buyer's presence, or even that the buyer personally inspected the bulk pending the negotiation in a casual way, and without relying, or being understood to rely, upon such inspection as the inducement of his purchase. Instances of sales where a sample or specimen was exhibited to the purchaser, and yet the sale could not be pronounced a sale by sample, are not unfrequent; the decisive circumstance against such a conclusion being, that the buyer had examined the property as minutely as he could have wished, or else had taken some express warranty of quality from the seller to strengthen himself.² On the other hand, the inclination of the courts is to construe every sale transaction into a sale by

¹ Story Sales, § 376; Benj. Sales, bk. 4, pt. 2, c. 1, § 3; *Beirne v. Dord*, 1 Seld. 95; cases *infra*.

² See, *e.g.*, *Tye v. Fynmore*, 3 Camp. 462; *Gardiner v. Gray*, 4 Camp. 144; *Kellogg v. Barnard*, 10 Wall. 383.

sample, where it appears that the buyer's opportunity to inspect at the time of the bargain, owing to the mode of packing, was necessarily partial, unsatisfactory, and preliminary, and the seller allowed him to break the bulk enough to see a small portion and no more.¹

In *Day v. Raguet* the bargain was for whiskey, to be "five per cent better than" a certain sample exhibited. The court decided, that, as the subject-matter of sale was (in this and certain other respects shown by the evidence) to be essentially different from that exhibited to the buyer, the indispensable element of a sale by sample was wanting; for, to constitute a sale by sample, the parties must have contracted solely with reference to the sample or article exhibited, and mutually understood that the bulk should be found like it.²

Now, in the sale of goods by sample, a warranty by the seller is universally implied, according to the authorities, that the bulk shall correspond with the sample in quality.³ That it shall be the same, too, in kind and character, if the contract be of unascertained goods, and that, in any case, the buyer shall have a fair opportunity of comparing bulk and sample to test the substantial correspondence in nature and quality, is also inferable from the contract, as our last chapter shows; such further implied undertakings, however, on the seller's part, being more properly treated, we think, as fundamental conditions of the sale, than as stipulations so purely collateral

¹ *Ib.* Cf. *Salisbury v. Stainer*, 19 Wend. 159, and *Williams v. Spafford*, 8 Pick. 250. The former case ruled it no sale by sample, where the seller of bales allowed the buyer to rip them up and examine for himself; but in the latter case the purchaser drew out specimens from a hole in the side of the package, and this was treated as a sale by sample. But see *infra*, p. 373.

² *Day v. Raguet*, 14 Minn. 273.

³ *Story Sales*, § 376; *Parker v. Palmer*, 4 B. & Ald. 387; *Parkinson v. Lee*, 2 East, 314; *Benj. Sales*, bk. 4, pt. 2, c. 1, § 3; *Gunther v. Atwell*, 19 Md. 157; *Williams v. Spafford*, 8 Pick. 250; *Day v. Raguet*, 14 Minn. 273; *Beirne v. Dord*, 1 Seld. 95; *Hanson v. Busse*, 45 Ill. 496.

to the contract as a warranty.¹ In a word, the seller, by offering the specimen or sample alone for present inspection, means to assure the buyer that the bulk will be found like it in kind and quality.

A sale is sometimes made by what is called "average sample;" the seller taking samples or specimens from various packages, mixing them, and then giving the mixture to the buyer, which the latter accepts as the real sample of the bulk. This is as much as to say that the mixture and the bulk shall, in substance, correspond; and the real test on a sale by average sample — as where, for instance, in selling a lot of beans in bags, the seller takes a handful from each of several bags, mixes them, and shows the mixture to the buyer — is, not that some packages of the bulk can be rejected as inferior to the average, but whether, if the contents of all the packages were mixed together, the quality of the bulk so formed would equal the average sample.²

Sales by sample certainly contemplate a future inspection by the buyer, when he shall have full opportunity to satisfy himself of the correspondence of the bulk with the sample: whereupon, the test appearing satisfactory, and the evidence showing that he must have accepted the bulk accordingly, — all of which may be inferred from circumstances and the lapse of time, — the seller's warranty, as such, can be no longer available. After the buyer has made such final examination as he thinks fit, and knowingly accepted the goods as being of the kind and quality called for, his rights under the contract are concluded, even though he misused his opportunity by making a careless examination.³ For, in one aspect, the case is somewhat as Cochran, J., has put it: "Strictly speaking, a contract of sale by sample is not a warranty of quality, but

¹ *Supra*, pp. 321, 322.

² *Leonard v. Fowler*, 44 N. Y. 289.

³ *McCormick v. Sarson*, 45 N. Y. 265; *Morse v. Brackett*, 98 Mass. 205; *Carson v. Baillie*, 19 Penn. St. 375; *Dutchess Co. v. Harding*, 49 N. Y. 321; *Barnard v. Kellogg*, 10 Wall. 383.

an agreement of the seller to deliver, and of the buyer to accept, goods of the same kind and quality with the sample.”¹ But though sample comes in usually under a preliminary, and bulk under a final inspection, it should not be forgotten that fraud vitiates; so that any acceptance which is induced by the seller’s fraud or artifice, whereby a proper examination is prevented or interfered with, leaves the buyer’s rights unimpaired under the contract.² Nor can the buyer’s acceptance of part on delivery as corresponding with the sample prevent him from rejecting what is subsequently delivered under the same contract.³

The inspection which precedes a consummation of the bargain may be such, notwithstanding samples are shown by the seller during the negotiation, as to preclude the supposition that the transaction was intended to be a sale by sample, instead of an out-and-out sale of ascertained and inspected chattels. *Barnard v. Kellogg* is a strong case in point, where the decision of a lower Federal tribunal was reversed on appeal, by the Supreme Court of the United States, a few years ago. A broker had wool on sale for a Boston principal, with instructions not to sell unless the purchaser came on and examined the wool for himself. Negotiations were made through this broker with parties resident in Hartford by the exhibition of samples; and the Hartford parties agreed to purchase the wool at a certain rate, if equal to the samples furnished; the contract providing expressly, however, that they should examine the wool in Boston at a certain day, and report whether they would take it. They went to Boston; and there they were allowed to examine the wool as fully as they wished, opening four bales, and declining to inspect more, though invited to open all. The bargain was thereupon concluded. Some months later, a number of the bales, when

¹ Cochran, J., in *Gunther v. Atwell*, 19 Md. 157.

² *Dutchess Co. v. Harding*, 49 N. Y. 321; *Mody v. Gregson*, L. R. 4 Ex. 49.

³ *Hubbard v. George*, 49 Ill. 275.

opened, proved to have been deceitfully packed, and to contain rotten and damaged wool. The buyers sued for indemnity; and the lower court decided in their favor, mainly on the supposition that there was by the usage of trade an implied warranty against false packing, so as to give the buyer opportunity for a later inspection at his leisure. But the Supreme Court, on appeal, repudiated the idea that any such usage could be alleged, where the parties, as in the present case, did not appear to have contracted with reference to it; and, the facts showing no knowledge on the seller's part of the false packing, the court enforced the maxim of *caveat emptor*, and left the buyers to bear the loss.¹ Now, in this transaction, the exhibition of a sample entered into the early negotiations; but the sale stood really upon the later examination of the wool in Boston, which, being with full opportunity to accept or reject, necessarily concluded the parties, unless they had chosen to distinctly designate this as something preliminary to a future and final inspection.

Once again: the reasonable inference from the contract may be, under some circumstances, that the parties intend to become mutually bound by the inspection of some third person, such as an official inspector; and mean that the sale shall take full effect when such inspection is completed, without awaiting any special examination by the buyer himself.² Of course the buyer may constitute any person his agent for comparing a bulk with a sample.

But the stipulations of a sale transaction may assume various shapes; nor is it altogether exceptional to find parties who sell by sample, as well as in sales by general description, binding themselves to the possible results of a final, following a sort of preliminary, examination of the bulk. One who bargains with a government is most likely expected to run the gantlet of officials, and pass his goods through the hands

¹ *Barnard v. Kellogg*, 10 Wall. 383.

² *Gunther v. Atwell*, 19 Md. 157.

of successive inspectors; the transaction, from its peculiar stipulations, all reduced to writing, being more commonly styled a "government contract" than a "government sale." To this class belongs *Heilbutt v. Hickson*, a late English case, wherein is largely discussed the law of sales by sample, as presented in a novel aspect.¹ The transaction involved the sale of shoes as between private parties, for the ultimate use, as they well understood, of the French army on a winter's campaign. The sellers, English shoe manufacturers, were to supply a large number of pairs according to a sample shown, at a certain price per pair, to the buyers, who were the London agents of French correspondents. The contract, which was quite minute in its provisions, required the shoes to be delivered free at a wharf in weekly quantities; to be inspected and the quality approved before shipment; payment in cash on each delivery. But, besides this inspection, it was further understood and agreed that the shoes were afterwards to be inspected by the French authorities at Lille. A quantity of the shoes proved to have paper in the soles. As the decision in this case turned upon a construction of the whole contract, including the manufacturer's own written offer, after the Lille authorities had discovered the defect, to take back any shoes that might be rejected by the French authorities in consequence of containing paper, we need not go into the evidence at length, which bore chiefly upon a question of damages. But the language used by Brett, J., with reference to a double inspection under a contract of sale by sample, is worth quoting; his view being, that the manufacturer's written offer to take back all rejected shoes had given the buyers no right which was not already embodied in the original contract. He says: "If the term of inspection, as agreed on, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection, as agreed upon, be different from

¹ *Heilbutt v. Hickson*, L. R. 7 C. P. 438.

the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to the sample, return them then and there on the hands of the seller ;” and he proceeds to show, that, under the circumstances of this particular case, there was nothing beyond an *apparent* inspection possible in London at the time of shipment, and consequently that the only *real* inspection which could take place was that contemplated at Lille. The fault in the goods was a secret defect of manufacture, committed, undoubtedly, with the knowledge of the seller or his servants.¹ To this same head may likewise be referred a New York case, where bullets were sold to the State authorities under an agreement which allowed an opportunity for full inspection of the property, even after its formal delivery.²

The bearing of intentional fraud and artifice upon sample sales of defective goods is worthy of a passing comment. *Heilbutt v. Hickson* was a case of goods supplied, not by a dealer, but by the manufacturer ; and hence the natural inference, that the seller or his servants knew that the shoes had paper worked into them. No class of men are more likely to be roughly handled in the courts than shoddy contractors ; and in this case the jury found that the shoes delivered under the contract and those ready for delivery were not equal to the sample, and that the defects could not have been discovered by any inspection which ought reasonably to have been made.³ On the other hand, in *Barnard v. Kellogg*, stress was laid upon the circumstance, that the seller of the goods fraudulently packed was neither the manufacturer nor the grower of the goods ; which was as much as to say that the denial of all knowledge that the bales which he sold contained rotten and damaged wool might, from a

¹ *Heilbutt v. Hickson*, *supra*.

² *Messmore v. N. Y. Shot Co.*, 40 N. Y. 422.

³ *Heilbutt v. Hickson*, L. R. 7 C. P. 438.

dealer, but not from a manufacturer or grower, be readily accepted.¹

This same distinction crops out in cases which present a bulk corresponding with the sample, but serious defects in both,—a state of things causing much perplexity. In *Heilbutt v. Hickson* the sample shoe contained paper fillings, apparently unknown to all parties, and undiscoverable by any ordinary examination; and it would appear from the language of Bovill, C. J., who gave judgment, that, if a manufacturer agrees to furnish goods according to sample, the sample is to be considered free from a secret defect of manufacture not discoverable on inspection, and unknown to both parties.² *Mody v. Gregson* is a case more strongly in point. Here a manufacturer had agreed to supply a quantity of shirtings according to a sample, each piece to weigh seven pounds. The shirtings were delivered and accepted; but it was afterwards found that the weight was made by introducing fifteen per cent of clay into the fabric, which rendered the goods unmerchantable. The presence of the clay could not be ascertained by any ordinary examination of the sample. Now, here the seller's conduct was blameworthy; and, being the manufacturer, he or his servants had most likely intended fraud. At all events, the buyer was allowed to sue for damages.³ But it is observable that the seller's fraud is not always stated to be the basis of the buyer's remedies in such cases; for in this last case it was maintained by the court that the sale carried with it, under the peculiar circumstances, an implied warranty of merchantable quality, besides that of correspondence with the sample.⁴ This last can hardly be accepted as a general proposition; for, whenever a

¹ *Barnard v. Kellogg*, 10 Wall. 383.

² See *Benj. Sales*, bk. 4, pt. 2, c. 1, § 3, reviewing *Heilbutt v. Hickson*, *supra*.

³ *Mody v. Gregson*, L. R. 4 Ex. 49. And see *Dutchess Co. v. Harding*, 49 N. Y. 321.

⁴ *Mody v. Gregson*, *ib.*

sale is based in good faith upon a *bona fide* sample, the seller's contract should be interpreted to mean that he will supply an article which corresponds in merchantable and other qualities to the sample; but, as to its intrinsic properties beyond this, the law forewarns the buyer, *caveat emptor*, and there is no implied warranty.

It is doubtless with reference to this issue of *bona fides* on a seller's part in sample sales that we are to understand Mr. Story's proposition, that if the sample is fairly drawn from the bulk of the goods, and the bulk corresponds with the sample, but there is a defect in the bulk, and in the sample itself as a part thereof, and this defect is unknown, and cannot be discovered by examination, there is no implied warranty against this defect, and the seller is not responsible.¹ Surely, if the honest dealer in goods which he did not make cannot ask as much as this, his sale, which purports to be to furnish according to a given specimen or sample, puts him at greater disadvantage than a simple sale by description; for he must then be bound to furnish an article like what he shows, and yet, in a contingency, unlike it. And we find Mr. Story's rule commended and applied where in a sample sale of cloths the seller had exercised good faith.² This was not the case of a manufacturer, however; and it may still be an open question, whether a grower or manufacturer who sells by sample is responsible or not for a latent defect in both sample and bulk beyond his own express warranty or fraud on his part. By this we mean, of course, a *latent* defect, — something hidden from both parties; for to offer a sample shoe for army purposes made of unserviceable stuff carefully secreted, or a sample of cloth artificially weighed down with clay, is to propose a bargain for goods which the manufacturer, or some one for whom he is answerable, knows were deceitfully prepared: the point of

¹ Story Sales, § 376.

² Dickinson v. Gay, 7 Allen, 29.

legal distinction is only that a mere seller may have dealt *bona fide* with goods on his hands, while the original maker or his own servants can hardly have been ignorant. A contract to sell by sample implies at least that the specimen is an honest specimen of an equally honest bulk.

As to defects really latent, however, such as a flaw in an iron boiler, which neither the manufacturer nor the party ordering it could have discovered, the law of implied warranty is somewhat capricious. There is a bias on the part of some tribunals against the party whose duty it was to supply something unascertained according to a description.¹ But the rule carefully set forth by Judge Selden of New York is as follows: Upon the sale of a chattel by the manufacturer, the seller is liable for any latent defect not disclosed to the buyer which arises from the manner in which the article is manufactured; and, if he knowingly uses improper materials, he is liable for that also; but not for any latent defect in the material which he is not shown, and cannot be presumed to have known.² And thus behind a blameless manufacturer might sometimes stand a blameworthy party who supplied him with defective raw materials. A manufacturer or grower is fairly held to stricter fulfilment in all such respects than the mere dealer in finished products, for his judgment, skill, and due care are specially relied upon; but as the question, whenever a thing is made or raised, and supplied to order, arises upon the contract of the parties, which contract is likely in such instances, not only to state the purpose of manufacture, but to be full of special stipulations, we need not pursue an inquiry which takes us beyond the true limits of the law of sales.³ Where an existing specific definite

¹ See *Rodgers v. Niles*, 11 Ohio St. 48; *Story Sales*, §§ 368, 369; *Brown v. Sayles*, 27 Vt. 227.

² *Hoe v. Sanborn*, 21 N. Y. 552. And see *Story Sales*, § 374; *Cunningham v. Hall*, 4 Allen, 268.

thing is sold without an express warranty of quality, *caveat emptor* is the rule as to latent defects, if the seller has dealt honestly.¹

We should not pass from this subject of implied warranty without noticing that defective articles, second-hand chattels, even those which the generality of mankind treats as refuse, may be the subject-matter of sale where a buyer stands ready to take them for a price. No warranty by implication can go beyond the reason of the particular contract, or insure that a chattel shall be supplied free from defects which were admitted at the outset to exist in any thing answering the description; and while, as we shall see hereafter in treating of illegal sales, a seller may incur a direct liability for selling some kinds of noxious and injurious articles, the sale of a defective chattel as such, if made in perfect good faith and without negligence, will not, without an express warranty, render the seller liable for such injuries as may afterwards result from the defect.²

Express warranty does not necessarily exclude such warranty as the law implies. There are cases, where, upon a true construction of the whole transaction, it has been ruled that the usual implied warranty of fitness for its purpose — the thing having been ordered by a buyer, who necessarily trusted to the seller's judgment in selecting and supplying the goods — was re-enforced by an express warranty given for the buyer's benefit, so as to guard against special emergencies.³ But, in general, no warranty is implied where the parties have taken care to express the warranty by which, in

¹ *Parkinson v. Lee*, 2 East, 314; *Kingsbury v. Taylor*, 29 Me. 508; *Hadley v. Clinton, &c. Co.*, 13 Ohio, n. s. 502; *Frazier v. Harvey*, 34 Conn. 469; *Lord v. Grow*, 31 Penn. St. 88; *Hoe v. Sanborn*, 21 N. Y. 552.

² *Loop v. Litchfield*, 42 N. Y. 351. And see *Holden v. Clancy*, 58 Barb. 590.

³ *Bigge v. Parkinson*, 7 H. & N. 955.

that respect, they mean to be bound. *Expressum facit cessare tacitum*.¹

Second. Concerning implied warranty of title. This is a subject more readily grasped than that we have just detailed ; but its law is by no means clearly settled. Nor does the doctrine of the English courts appear to coincide with ours of America. In a sale of lands, one grantor will give a warranty of title, so as to assure peaceable enjoyment to his grantee against the world ; but another will merely quitclaim, in other words undertake that the grantee's title shall be good against himself and those claiming under him, but against none other. Now, we shall readily admit that the seller of personal property may expressly warrant title for the buyer's benefit to any extent he pleases ; but the question is, supposing he has given no express warranty, whether the law will infer, from the nature of the contract and the obligations it imposes, a binding assurance on the seller's part that he was the true owner of what he offered to sell, and will make the title good if dispute arises.

The doubt relates, however, to executed contracts, and not to those which are executory, with the transfer still incomplete. For, in the latter instance, the purchaser has the right to refuse acceptance of the chattel under a defective title, unless the seller makes that title clear ; and, if he has advanced the purchase-money in whole or in part, he may recover it on the same ground of a defective title.² Nor, in equity, is a vendor allowed to enforce specific performance on a total failure of consideration ; nor, indeed, with an abatement, where there is only a partial failure of consideration, unless the vendor has assented to so modify the original bargain.³

¹ *Parkinson v. Lee*, 2 East, 314 ; *Dickson v. Zizinia*, 10 C. B. 602 ; *Benj. Sales*, bk. 4, pt. 2, c. 1, § 3.

² *Story Sales*, § 367 ; *Parke, B.*, in *Morley v. Attenborough*, 3 Ex. 500.

³ *Ib.* ; 1 *Story Eq. Jur.* § 143.

Hence, if A. agrees to sell B. one hundred barrels of flour, he cannot claim to have fulfilled the condition precedent which the bargain imposes by tendering one hundred barrels which some one else owns in whole or in part; nor is B. bound to accept any such tender.¹

But, again, where a person offers chattels for sale, knowing that they do not belong to him, and conceals such knowledge from the purchaser, the sale is voidable by the latter as a fraudulent sale. If, however, the seller communicates this knowledge to the buyer at the time, he makes the buyer a participant in the fraud, or the purchaser of an infirm title, and so closes the buyer's mouth.²

Furthermore, we have seen, in discussing the topic of express warranty, how ready the courts are to construe language, acts, and conduct of the seller, amounting to an affirmation of any thing concerning the specific subject-matter, which might reasonably be the basis of warranty, into an express warranty; this upon the reasonable assumption that the seller so affirmed in order that the buyer might rely, and that the buyer relied accordingly. Here is a principle broad enough to cover in many of the cases which might involve the issue of warranty or no warranty of title.³

A warranty of title against the world cannot be implied where it is expressly negatived, or where the circumstances show that such negation entered into the bargain.⁴ Thus, one may buy certain barrels of flour, knowing that they are claimed by a third party, and meaning to take the risks; in other words, he may have bargained merely for the seller's quitclaim of title. Perhaps to this general principle should be referred numerous cases which are sometimes distinguished differently in the courts.⁵ It is clear that sheriffs,

¹ See Benj. Sales, bk. 4, pt. 2, c. 1, § 2.

² *Ib.*; fraudulent sales, *post*; *Sherman v. Johnson*, 56 Barb. 59.

³ *Supra*, pp. 336, 337.

⁴ *Story Sales*, § 367.

⁵ See *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127; *Bagueley v. Hawley*, L. R. 2 C. P. 625.

and officers of the law generally, also executors, administrators, and other trustees, who sell property real or personal, in such capacity, are presumably held to no implied warranty of title; a sufficient reason being, that the character of the office precludes the supposition that such a party is the true owner of that which he offers for sale. Jurisdiction in the premises, and regularity of proceedings by virtue of the office, is the gist of the title warranty in such cases; and positive law prescribes what effect shall attend the sale which is fairly and properly made under such circumstances.¹ So, too, the sale by the pledgee or mortgagee of a chattel, as such, purports to transfer only the peculiar title of pawnbroker, pledgee, or mortgagee; and the circumstances must repel any inference that a warranty of title *as owner* is intended, though the title thus originating may have ripened into a good one; and, in absence of his express warranty of title or fraudulent conduct, the transaction will be taken accordingly.² The same may be said of any sale expressly made by a mere bailee who professes to sell as such, under some special claim, and not as a full proprietor.

The case of an incorporeal chattel is somewhat peculiar with respect to warranty of title; for, its existence as property being founded in a money right, the seller's title must ultimately prove valid, and the right enforceable, or there is nothing to be enjoyed. But the chance of realizing what is of doubtful validity is really the moving consideration of many a purchase; and claims may be purchased upon a calculation of the money's-worth of the seller's doubtful title, and not necessarily because the title is deemed impregnable; though, in other instances, it is the chance of reducing to a settlement by proper remedies, supposing the right is clear.

¹ *Chapman v. Speller*, 14 Q. B. 621; *Scranton v. Clark*, 39 N. Y. 220; *Hensley v. Baker*, 10 Mis. 157; *Blood v. French*, 9 Gray, 197; *Brigham v. Maxey*, 15 Ill. 295; *Bartholomew v. Warner*, 32 Conn. 98.

² *Morley v. Attenborough*, 3 Ex. 500, the case of a pawnbroker.

The sale of a money-right, known by the seller to be worthless, is impeachable, of course, by the deluded buyer.¹ But, in the absence of fraud, would such a transaction ordinarily imply that the seller transfers the thing for what it is worth, by way of quitclaim, or that he warrants the title? Upon the former view the English courts appear to have sometimes acted; deciding, for instance, that the sale or assignment of a patent must be presumed to imply, not that the patent right is original in the vendor, and indefeasible, but merely that he has the letters-patent.² In this country, however, it has been held, that in the stronger case, where one sold a machine whose fitness to the purchaser depended upon the right to use a certain patent contrivance involved in its manufacture, and the seller knew this, and represented that he had the right to so manufacture, he is liable, on an implied warranty of the thing's fitness for a designated purpose, if not of his own title, where it proves that the manufacture was illegal, and the use of the thing also illegal, because infringing upon a third person's patent for the contrivance.³ Upon the whole, the sale of incorporeal property would appear under some circumstances, but not invariably, to negative any implied warranty of title in the seller.

But, once more, every one who sells a thing engages by implication, if not to warrant against others, at all events to quitclaim as to himself and those under him, agreeably to the character under which he has assumed to make the sale. For, as Parke, B., has said: "The bargain and sale of a specific chattel by our law undoubtedly transfers all the property the vendor has, where nothing further remains to be done, according to the intent of the parties, to pass it. But it is made a question, whether there is annexed by law to such a contract, which operates as a conveyance of the property,

¹ See *Holden v. Clancy*, 58 Barb. 590.

² *Smith v. Neale*, 2 C. B. N. s. 67; *Hall v. Conder*, 2 C. B. N. s. 22.

³ *Pacific Iron Works v. Newhall*, 34 Conn. 67.

an implied agreement on the part of the vendor that he has the ability to convey.”¹

The point of inquiry, therefore, becomes this, — whether, in a sale of personal property, where the circumstances do not negative an intent to warrant title, the party who sells that which he honestly puts forward as his, and yet says nothing to the purchaser which can fairly be construed into an express warranty of title, warrants by implication that the title is in himself as owner, so as to enable the buyer after the sale is consummated to procure indemnity in case of his dispossession by some third person having a paramount title. This leads us to consider (1st) the English doctrine, (2d) the American doctrine, and (3d) the rule of the civil law.

(1st.) The English doctrine. Some of the ancient writers, such as Coke and Noy, were evidently of the opinion that *caveat emptor* was the common-law rule as to title.² Noy puts it quite pointedly: “If I take the horse of another man and sell him, and the owner takes him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse, and *caveat emptor*.” This is severity itself; nor was it pretended that the rule of the civil law corresponded. But Blackstone says later: “A purchaser of goods and chattels may have a satisfaction from the seller, *if he sells them as his own* and the title proves deficient, without any express warranty for that purpose.”³ This language is not quite clear, for the selling as one’s own might possibly refer to a state of facts from which an express warranty was deducible; but it indicates the disposition at a more advanced stage of the law to relax the rigor of the old maxims in this respect.

But the earliest English decision which gives the question much consideration is *Morley v. Attenborough*, — the case of a pawnbroker’s sale, where nothing more was actually estab-

¹ Parke, B., in *Morley v. Attenborough*, 3 Ex. 500.

² Noy Max. c. 42; Co. Lit. 102 a.

³ 2 Bl. Com. 451.

lished than that a pawnbroker who sells an unredeemed pledge under that name gives no warranty by implication that his title is good as owner of the goods.¹ The decision was doubtless correct, and upon a principle already alluded to; but Parke, B., in rendering an elaborate opinion, laid down some propositions *ex cathedra*, which, though deriving lustre from his great name, have not altogether stood the shock of time. After ransacking the older authorities of the common law, the result of whose teachings, he says, is, "that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality," he cites Blackstone and Wooddeson of later writers to show that in recent times a different notion appears to be gaining ground. But, on the whole, he thus concludes: "It would seem that there is no implied warranty of title on the sale of goods, and that if there be no fraud a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct; and the question in each case where there is no warranty in express terms will be, whether there are such circumstances as will be equivalent to such a warranty."²

Of Baron Parke's opinion Lord Campbell remarked in a later decision: "According to *Morley v. Attenborough*, if a pawnbroker sells unredeemed pledges, he does not warrant the title of the pawnor, but merely undertakes that the time for redeeming the pledges has expired, and he sells only such right as belonged to the pawnor. Beyond that the decision does not go; but a great many questions are suggested in the judgment, which still remain open."³ Mr. Benjamin, who has cited the English cases in historical order with great fulness, calls attention to an old equity case, which Lee, C. J., afterwards explained, in correction of the reporter,

¹ *Morley v. Attenborough*, 3 Ex. 500.

² *Ib.* And see *Ormerod v. Huth*, 14 M. & W. 604.

³ *Sims v. Marryat*, 17 Q. B. 281.

Peere Williams, so as to give this version: "It was held by the court, that offering to sell generally was sufficient evidence of offering to sell as owner, but no judgment was given, it being adjourned for further argument."¹ To be sure, this can hardly serve as an authentic precedent under the circumstances; but the remark of Lee, C. J., was evidently overlooked by Parke, B., in his review of the old authorities; and, so far as it goes, it tells against his conclusion. We are also to observe that the summary of the law concerning implied warranty of title on sales of personal property which *Morley v. Attenborough* contains, is, after all, quite cautiously expressed. For Parke, B., admits very slight circumstances, which, in his opinion, would be equivalent to a warranty of title; as, for instance, he said, if the articles are bought in a shop professedly carried on for the sale of goods, the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. And again, he makes the important admission, that possibly, though the seller might not be sued on the breach of an implied warranty of title for unliquidated damages, yet the purchaser might make out a case for recovering his purchase-money as paid on a consideration that had failed.² The true effect of the *dicta* in *Morley v. Attenborough*, then, if not taken by detached paragraphs, is to leave the true law of the subject still in obscurity.

But the above hint as to a buyer's recovering his purchase-money, though not damages, upon the failure of his title to the chattel sold, was not thrown away,—a distinction which Noy's Maxims, however, would not have justified.³ In

¹ Benj. Sales, bk. 4, pt. 2, c. 1, § 2; *L'Apostre v. L'Plaisier*, 1 P. Wms. 318, as explained by Lee, C. J., in *Ryall v. Rowles*, 1 Ves. 348.

² *Morley v. Attenborough*, 3 Ex. 500, *per* Parke, B.

³ Noy Maxims, c. 42, cited *supra*, p. 385. But Erle, C. J., in *Eichholz v. Banister*, 17 C. B. N. S. 708, undertakes to reconcile Noy with his decision.

Chapman v. Speller it was said by the court: "We wish to guard ourselves against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel, where the purchaser does not have that for which he paid."¹ The point of this decision was merely to disaffirm the application of an implied warranty of one's title to goods sold under a sheriff's sale. At last, in *Eichholz v. Banister*, which was decided in 1864, the buyer's right to recover his purchase-money as for failure of consideration, should the title prove worthless, was affirmed under circumstances quite apposite. Certain printed cloths were bought of a job warehouseman, which were affirmed to be a job lot just received by him. The cloths were delivered, and the price paid; but it turned out afterwards that they were stolen, and the buyer was compelled to restore the property to the true owner. The buyer sued on the common money counts; and the defence set up was, never indebted. The decision was to the point, that, under the circumstances shown, the buyer could recover the price paid.² The form of action was not such as to bring to a direct issue the question of a buyer's further right to recover damages as for breach of contract in such an emergency.

The English authorities actually concede, then, that the buyer may recover the price paid. But whether the failure of the seller's title involves, too, the breach of an implied warranty of title, so as to justify damages, is a matter still in abeyance. Some still later cases intimate doubts whether *caveat emptor* remains the general rule of law as to title; but they decide nothing, the facts either showing that the sale was not by one who offered the goods in the capacity of a full owner, or else sufficiently negating the presumption that any implied warranty of title was intended to be given.³

¹ *Chapman v. Speller*, 14 Q. B. 621.

² *Eichholz v. Banister*, 17 C. B. N. s. 708.

³ *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127; *Bagueley v. Hawley*, L. R. 2 C. P. 625.

But to revert to *Eichholz v. Banister* (which presents, perhaps, the one satisfactory state of facts upon which this rule is rested in the English courts), and assuming that the important doctrine which it promulgates is not to be hereafter repudiated by some higher tribunal, we cannot but observe that the whole *animus* of that case is to sustain the principle of an implied warranty of title on the part of him who sells a chattel as its owner. The judges read separate opinions; but upon this point they were all agreed. And, as if to show how little *Morley v. Attenborough*¹ had positively declared to the contrary, Erle, C. J., drew his argument from the very admissions of Parke, B., in that case. "In all ordinary sales," says Erle, C. J., "the party who undertakes to sell, exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and would, therefore, as I think, commonly lead the purchaser to believe that he was the owner of the chattel. In almost all ordinary transactions in modern times, the vendor, in consideration of the purchaser paying the price, is understood to affirm that he is the owner of the article sold." In this Byles, J., concurs, adding: "It has been stated, over and over again, that the mere sale of chattels does not involve a warranty of title, but certainly such statement stands on barren ground, and is not supported by one single decision; and it is subject to this exception, that if the vendor by his acts or by surrounding circumstances affirm the goods to be his, then he does warrant the title."² To these statements of the law Mr. Benjamin gives ready support, while yet admitting that the English doctrine of implied warranty of title is still involved in doubt.³ "The exceptions," he says, "have become the rule, and the old rule has dwindled into the exception, by reason, as

¹ 3 Ex. 500, cited, *supra*.

² *Eichholz v. Banister*, 17 C. B. N. S. 708.

³ *Benj. Sales*, bk. 4, pt. 2, c. 1, §§ 1, 2.

Lord Campbell said, 'of having been well-nigh eaten away.'"¹

(2d.) The American doctrine. American text-writers maintain a distinction which our courts have repeatedly recognized, — namely, between chattels which are in the seller's possession, and chattels which are in the possession of some one else; holding that in the former case there is an implied warranty of title on the seller's part, but none in the latter.² This distinction, which the later English cases appear to have repudiated, is said to be too deeply rooted in our law to be easily eradicated, even if it were shown to be misconceived in its origin.³ But when we reflect how little, after all, the precedents have established, how recently *Eichholz v. Banister*⁴ was decided, and what a considerable part of the law in England upon this subject rested previously upon mere *dicta*, we shall be slow to conclude that the American courts have found a safe harbor. There are recent cases in our State courts which tend to establish this preferable doctrine: that the sale of personal property implies a warranty of ownership in the seller, unless the circumstances are such as to justify a contrary presumption; but that where the goods are absolutely in a third person's possession, and neither actually nor constructively in the seller's, this is a strong circumstance against implying so full a warranty.⁵ In other words, the question is one of evidence, without any clear-cutting distinction in respect of possession by this or that party.

For what is meant by saying that chattels are not in the

¹ Benj. Sales, bk. 4, pt. 2, c. 1, § 2; *Sims v. Marryat*, 17 Q. B. 281, *per* Lord Campbell.

² Benj. Sales, bk. 4, pt. 2, c. 1, § 3; Story Sales, § 367; 2 Kent Com. 478; *Scranton v. Clark*, 39 N. Y. 220; *Long v. Hickingbotham*, 28 Miss. 772; *Whitney v. Heywood*, 6 Cush. 86.

³ Story Sales, 3d ed. Perk. n., p. 459.

⁴ 17 C. B. N. s. 708; *supra*, p. 388.

⁵ See *Sherman v. Champlain Trans. Co.*, 31 Vt. 162; *Morton, J.*, in *Shattuck v. Green*, 104 Mass. 42; *Gross v. Kierski*, 41 Cal. 111.

seller's possession? If I undertook to sell you a horse which some one else was known by both of us to possess under an adverse claim of ownership, the inference is a fair one that you bought my title subject to that incumbrance, running your own risks.¹ Whether, if that person's claim of ownership failed, and you got possession, and then got dispossessed after all, because some new party turned up from whom the horse was originally stolen, I should be liable for the failure of title, appears not to have been decided; but, as it seems, I should be liable, notwithstanding I sold a chattel when (as the text-writers say) I was out of possession: for the doctrine concerning sales by parties out of possession was only meant to exclude the inference of warranty against the possessor's superior title. As we have already seen, neither the American nor the English cases infer a warranty of title where the circumstances should repel such a presumption; while, on the other hand, express circumstances may raise an express warranty. Even as to the seller's possession of the chattel, the possession of the seller's warehouseman, bailee, servant, or agent, so understood, is constructively the seller's own possession, and the presumption must be accordingly;² and such is the rule, even where an owner in common of personal property, which is in possession of a third person as bailee of all the owners, sells his undivided share.³ The distinction between chattels in and out of the seller's possession must, then, under its most favorable aspect, be a narrow one to rest so broad a statement upon.

Wherever by the American rule the seller is understood to imply a warranty of title, — which is usually the case, at any rate, where he sells while in actual or constructive possession of the thing, — he is liable to the extent of indemnifying

¹ See *Long v. Hickingbotham*, 28 Miss. 272.

² *Dorr v. Fisher*, 1 Cush. 273; *Hubbard v. Bliss*, 12 Allen, 590; *Shattuck v. Green*, 104 Mass. 42; *Michel v. Ware*, 3 Neb. 229.

³ *Shattuck v. Green*, 104 Mass. 42.

the buyer against dispossession by others. And if the buyer is compelled, in order to retain the property, to discharge an incumbrance existing at the time of the sale, he may sue the seller in *assumpsit* as for money paid.¹ If an express warranty of title was given against incumbrances, all the more surely must the seller be held to respond.² "Warranty of title" is the term constantly employed in our courts to meet such cases; but whether meaning that damages shall be computed on a different footing from the simple reckoning of loss of consideration does not seem to have received any particular attention.

It would appear, that, in cases which imply a warranty of title, a full title acquired by the seller after sale necessarily enures to the buyer's advantage.³ But it is held in New York, that where one out of possession makes a sale, so as not to be liable on an implied warranty of title, and the chattel subsequently comes to his possession by purchase, and is transferred to a *bona fide* purchaser, this purchaser takes the title absolutely free from all claim on behalf of the first purchaser.⁴

(3d.) The rule of the civil law. A sale, by the civil law, always carried with it an implied warranty against eviction. We are to bear in mind that the maxim of Roman jurisprudence made the sale a contract not *rem dare*, but *præstare emptori rem habere licere*. The vendor did not bind himself to transfer to the buyer the property in the thing sold; and, when the contract was once completed, possession only was what he was bound to deliver. But *vacua possessio*, not a title in litigation, was herein implied; and if the vendor sold,

¹ *Sargent v. Currier*, 49 N. H. 310. But see *Gross v. Kierski*, 41 Cal. 111, which intimates that there is usually no breach of the warranty until actual dispossession.

² *Atkins v. Hosley*, 3 Thomp. & C. (N. Y. Supr.) 322; *Hahn v. Doolittle*, 18 Wis. 196. And see *Michel v. Ware*, 3 Neb. 229.

³ *Sherman v. Champlain Trans. Co.*, 31 Vt. 162.

⁴ *Scranton v. Clark*, 39 N. Y. 220.

knowing that he was not the owner, and so wilfully exposed the buyer to the danger of eviction, it was a fraud ; so too, after the sale, he remained responsible to warrant and defend the purchaser against eviction from possession. The eviction against which the vendor thus warranted the purchaser was, however, an actual dispossession by means of a judgment ; and the practice was, for the purchaser, whenever sued by a person who claimed superior title, to cite in the vendor, and give him an opportunity to defend the suit.¹ The French civil code rigorously enforces the seller's obligation of warranty against eviction in all cases.²

The preceding review of cases under the law of warranty tends to show that the implied warranty, properly so called, of sales, concerns itself chiefly with quality ; while matters of kind and quantity as fulfilling a buyer's description are brought rather within the rule of conditions precedent. Leaving out questions of title, the judicial confusion appears to have chiefly arisen in staying the disastrous consequences which attend a conventional *caveat emptor*,—a rule which was obviously designed by the fathers of the common law, not to trick the buyer out of the subject-matter which he had bargained for, but to throw him upon the exercise of his own mental faculties in ascertaining its true qualities ; not to give sellers, as a class, an undue advantage, but to make men purchase with their wits about them. *Caveat emptor* only goaded the buyer in case he had misused his own opportunities of inspection ; where he had imprudently trusted to good luck or the seller's scruples. Did the minds of both parties meet upon a specific thing, such as a horse, a sack of flour, a piece of cloth, or an article of furniture ? For, in the olden time, most chattels bargained for and sold were of this simple character, visible and

¹ Story Sales, § 367 ; Pothier Vente, pt. 2, c. 1, § 2, No. 82 ; Benj. Sales, bk. 2, c. 7, bk. 4, pt. 2, c. 1, § 3.

² Civil Code, arts. 1625, 1629 ; Benj. Sales, bk. 4, pt. 2, c. 1, § 3.

tangible. Then the buyer could not exonerate himself from blame if the seller had given him a chance to handle, examine, poise, talk over, such attributes as he thought fit, and ask for an express warranty to cover every doubtful point; the seller transferred ownership in the specific thing; and that was enough. But if the circumstances were such that the buyer's opportunity of inspecting its qualities must necessarily have been deferred; if, for instance, something had to be made to order, or an article had to be procured from a distant market,—the situation was quite different. Here the precise subject-matter which should eventually fill the contract was not where both could judge of it, most likely not even in existence; and the buyer could only leave his order, describing what should be supplied him, and detailing its character at pleasure; and the seller was to furnish something of corresponding description. The seller's judgment being necessarily relied upon, and the description being a rule of guidance, the seller was bound to supply what in truth answered that description, and was so salable in the market; the nature of the contract called for so much. But here the seller's duty terminated; for *caveat emptor* would throw upon the buyer all additional risks as to quality and the inherent fitness of such a thing for his own unexplained purposes; the doctrine further suggesting, that so soon as the buyer had an opportunity of inspecting the article, and ascertaining its fair compliance with his description, he was bound to examine and reject for cause, or be for ever held to his bargain as *ad idem* with the seller in all respects. So when, at a much later stage, merchants took up the practice of dealing in specific commodities by bargaining over a representative sample, *caveat emptor* still prevailed: the bulk furnished should correspond with the sample, to be sure; but of its intrinsic qualities the buyer was to judge by testing the sample, and using all the precautions in his power. Implied warranty appears to be, therefore, a doctrine by no means at variance with the policy

of *caveat emptor*; it is rather the reasonable adaptation of that policy to emergencies: for still, as before, the subject-matter delivered by the seller must be essentially that bargained for; while upon the buyer is ever cast the responsibility of taking heed, to the extent of his opportunity, that the thing which he means to purchase is worth all he agrees to pay for it.

CHAPTER VII.

DELIVERY.

WE have seen, in the course of the preceding chapter, that the responsibilities of warranty, which are not necessarily confined to one or another of the parties entering into a mutual agreement, rest, for all practical purposes, under the law of sales, upon the seller alone. There remains to be considered one more duty which the law lays upon the seller, as his own share of the burdens attending a right performance of the contract of sale; namely, delivery of the subject-matter.

In order to understand this subject of delivery properly, we must discriminate between the different senses in which the word is employed. That transfer of right incidental to every sale, whereby at a certain point in the transaction the property and risks of ownership shift from one party to the other, is sometimes called "delivery;"¹ but inaccurately, we think, so far as concerns things which require a bodily transfer in execution of the contract. Handing certain goods to the buyer is an act by no means contemporaneous with the abstract passing of property to these goods: for, as we have seen, under some conditions, the property will pass before the buyer gets the goods into his possession; and under others, not even after he has acquired possession.² The corporeal tradition stands on its own merits; and it is this transfer of the possession of a thing from one party to another, which, in the true sense, constitutes a delivery. But, even in the sense of

¹ See Parke, J., in *Dixon v. Yates*, 5 B. & Ad. 340.

² Cf. chs. 2 and 5, *supra*.

a transfer of possession, there are in our law two leading senses in which the word "delivery" may be employed: (1st) to denote a delivery of possession in performance of the contract; (2d) to denote that delivery, which, as the correlative of actual receipt by the buyer, is constantly met with in cases arising under the Statute of Frauds,—a statute, which, in its peculiar application to the subject of sales, will receive an extended notice hereafter. We shall, in this chapter, treat of delivery in the first and more natural signification of the term. Even here, we shall not escape the need of a subdivision: for there is a constructive delivery of possession which the law frequently admits as a full performance of the duty of delivery on the seller's part; while there is a delivery involving a total and unqualified surrender of possession so final and complete as utterly to destroy the vendor's lien.¹ Of the extent of a vendor's lien we shall treat under the head of the seller's remedies: our present concern is only with that surrender of possession which amounts to a sufficient fulfilment of the seller's duty of performance.

To avoid logical embarrassment, therefore, with a word so fruitful of legal definitions as "delivery," is no easy matter. But to recapitulate a little the substance of former chapters: A bargain of specific goods having been completed, there becomes at once a "delivery," or rather transfer of property: but before the goods are actually delivered, so as to constitute a complete "delivery" of possession, the buyer is expected to pay or adjust what is due, the seller meantime retaining a lien on the goods for his price; though when the seller gives the goods to the buyer's agent or carrier, or to the buyer in person, in pursuance of the sale, the case presents a "delivery" so complete as to divest the seller of his lien.² One last right may, however, be exercised by the original owner, where the goods are still in transit, and the buyer

¹ See Story Sales, §§ 294, 295, 331; Benj. Sales, bk. 4, pt. 2, c. 2.

² *Supra*, chs. 2, 4.

proves insolvent,—namely, that of stoppage *in transitu*; and of this right, as well as the lien, we shall have more to say hereafter.¹ Such is the sale transaction as usually developed in the English law. But, in the United States, the favorite sale appears to be that with a transfer of title conditioned upon paying or securing the price, where “delivery of possession” precedes, or is concurrent with, the “delivery” or transfer of title: there may not be a complete “delivery” of the goods, when they are put into the buyer’s custody in expectation of payment, in the sense of divesting the buyer either of his title or of his lien.² Either aspect is, however, a presumptive one. Nor are we to forget that weighing, measuring, or other acts, may be requisite on the seller’s part to put the chattels into a deliverable state before delivery can take place at all, or even a transfer of property right.³

The duty of the seller as concerns delivery depends in any case upon the express or implied terms of the contract, which may be varied or extended by the usage of trade or peculiar circumstances attending the bargain; and, to get at the extent of this duty, we must search out the real intent of the contract. Two leading kinds of contract are found: one, a sale for payment on delivery; the other, a sale on credit. The completion of the contract of sale, where the right of property has passed, leaves the buyer free to take possession: but the seller’s duty to deliver possession is not unqualified; it cannot be enforced against him to the disregard of conditions precedent of payment on the buyer’s part, nor so as to absolve the latter from performing such other conditions precedent as the contract may have embraced, inconsistent with the parting of possession by the seller. In sales for payment on delivery, the seller is not bound to deliver possession until he gets payment; though, on the other hand, his duty requires him to deliver or tender the chattel before

¹ See seller’s remedies, *post*.

² *Supra*, chs. 2, 5.

³ *Supra*, c. 2; Story Sales, § 296.

he can sue for non-payment.¹ But, again, the sale being upon credit, where nothing is agreed upon as to the time of delivering the chattel, "the vendee," as Bayley, J., has said, "is immediately entitled to the possession, and the right of possession and the right of property vest at once in him: but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession."² It cannot be said that the intent of any contract requires the seller to surrender final possession of the goods to one who will be manifestly unable to pay for them.

The seller, in the absence of a contrary agreement, is not bound to send or carry the goods to the buyer: it is enough that he stands ready to deliver them whenever the buyer sends for them, and that he offers no improper obstruction to their removal.³ But the contract may be, and frequently is, such as requires the seller to forward the goods to the buyer.⁴ Once more: the parties may have mutually manifested an intention that the seller shall make delivery conditional upon the performance of certain acts by the buyer; and here the principle of notice would apply.⁵ The character of the acts to be performed on either side, and the order of performance, may be inferred under any circumstances from the nature of the agreement; the law favoring a natural and common-sense interpretation.

It follows, that, as to the *place* of delivery, the law presumes a delivery of the chattels to have been intended at the

¹ *Supra*, c. 5; *Bloxam v. Sanders*, 4 B. & C. 941, *per* Bayley, J.; *Story Sales*, §§ 299-303.

² *Bloxam v. Sanders*, 4 B. & C. 941, *per* Bayley, J.; *Tooke v. Hollingsworth*, 5 T. R. 215; *Benj. Sales*, bk. 4, pt. 2, c. 2. See, as to the seller's remedies, *post*.

³ 2 Kent Com. 505; *Benj. Sales*, bk. 4, pt. 2, c. 2; *Story Sales*, §§ 300, 301, 312.

⁴ *Story Sales*, § 302.

⁵ *Armitage v. Insole*, 14 Q. B. 728; *Stanton v. Austin*, L. R. 7 C. P. 651; *Benj. Sales*, bk. 4, pt. 2, c. 2; *supra*, c. 5.

place where they were when the bargain was completed; and the seller should be ready to perform accordingly. To quote Chancellor Kent: "If no place be designated by the contract, the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand, and is silent as to the place."¹ Such being the state of things, it is not incumbent upon the seller to take the goods from place to place in search of the buyer; nor, indeed, would it be prudent thus to expose the property to hazard and increased expense.² On the other hand, as every one knows who goes shopping in large cities, the usual course of dealing frequently puts the seller under an obligation of sending the goods to his customer's house. Sometimes the seller holds himself ready, by the express terms of the contract, to send the chattels to the buyer's address; and, if this address be designated, the seller must be ready to make appropriate delivery; but if the buyer fail to designate the place at which he desires delivery made, as he ought in any contract of this kind, the seller performs his duty, so as not to be liable for breach, by having the things ready on his own premises awaiting information.³ Wherever a place of delivery is definitely agreed upon, the buyer is not bound to accept the goods, nor the seller to tender them elsewhere;⁴ and if the goods at the time of sale be in the buyer's own possession, and under his control, there is presumed to be no other place of delivery agreed

¹ 2 Kent Com. 505; Pothier *Traité des Oblig.*, No. 512; *Rice v. Churchill*, 2 Denio, 145; *Smith v. Gillett*, 50 Ill. 290; *Middlesex Co. v. Osgood*, 4 Gray, 429.

² *Ib.*; *Benj. Sales*, bk. 4, pt. 2, c. 2; *Story Sales*, §§ 307, 308, 391.

³ *Lucas v. Nichols*, 5 Gray, 309.

⁴ *Story Sales*, § 308.

upon, nor, indeed, any formal act of delivery expected at all.¹

The contract of sale implies, therefore, a license to the buyer to come upon the seller's premises at reasonable business-hours, and take the chattels bargained for, if no other place be designated as the place of their delivery; for, were it otherwise, the seller could defeat the proper performance of the contract.² Wherever, in fact, the seller is bound to have them at a designated place for the buyer to take possession, giving that opportunity for taking them would appear to be part of the seller's engagement. When delivery is to take place upon a third person's premises, and the chattels are there, and not upon the seller's own premises, the third person must attorn to the buyer as his bailee, or else deliver possession in order to make the stipulated delivery effectual; and his refusal to do so might, under some circumstances, involve the seller in a breach of condition.³ But if any third person upon whose premises the chattels lie gives a license in advance to the seller to enter and take them, or attorns in advance to whomsoever they shall be sold, and this undertaking enters into the bargain as of chattels to be delivered on his premises, he cannot withdraw his implied permission afterwards.⁴

As to the *time* of delivery, the law supposes, in the absence of evidence to the contrary, a reasonable time; and, whether the seller or buyer is to take the initiative, reasonable diligence will be exacted, no more, no less, unless a definite time was set. But what is a "reasonable time" will depend upon the circumstances; and in investigating this point we try to

¹ *Shurtleff v. Willard*, 19 Pick. 210; *Warden v. Marshall*, 99 Mass. 305; *Lake v. Morris*, 30 Conn. 201.

² *McLeod v. Jones*, 105 Mass. 403, *per Wells, J.*; *Wood v. Manley*, 11 Ad. & E. 34; *McNeal v. Emerson*, 15 Gray, 384.

³ *Bentall v. Burn*, 3 B. & C. 423; *Wood v. Tassell*, 6 Q. B. 234.

⁴ *Salter v. Woollams*, 2 M. & G. 650; *Wood v. Manley*, 11 Ad. & E. 34.

get at the real meaning of parties who have failed to express themselves distinctly, not to discover a touchstone adapted to all cases alike. When a written contract of sale says nothing as to time, it may be shown, by parol evidence of the facts and circumstances attending the transaction, what the parties thought was a reasonable time for delivery: but it cannot be thus shown that any specific time was agreed upon, for this would be to contradict the written instrument; nor does reasonable time necessarily mean the time usually taken by other parties to perform a similar act.¹

Whether a written contract of sale expresses the time or not, its language may yet call for judicial interpretation. Thus "a reasonable time" necessarily involves longer delay than such expressions as "directly," "forthwith," or "immediately," which require great promptness, especially if the seller might have performed according to his promise, or else used means in his power to get his contract modified.² But the literal meaning of a single word or expression must sometimes give way to the evident intent of the whole instrument; and hence a contract to deliver "forthwith" may be found, upon comparison with a corresponding stipulation for payment within fourteen days, to mean delivery within fourteen days.³ So a contract to deliver goods "as soon as possible," according to its natural import, refers, not to a logical possibility, but to the power of the seller, consistently with the proper execution of his prior orders, to fulfil the stipulation.⁴ The word "month" generally means a lunar month; though in mercantile contracts understood to be a calendar

¹ *Ford v. Cotesworth*, L. R. 7 Q. B. 127; *Story, J.*, in *Cocker v. Franklin, &c. Co.*, 3 Sumn. 530; *Atwood v. Cobb*, 16 Pick. 227.

² *Duncan v. Topham*, 8 C. B. 225; *Rommel v. Wingate*, 103 Mass. 327; *Roberts v. Brett*, 11 H. L. Cas. 337.

³ *Stanton v. Wood*, 16 Q. B. 638. And see *Neldon v. Smith*, 36 N. J. L. 148, as to "immediate delivery."

⁴ *Attwood v. Emory*, 1 C. B. N. s. 110.

month, which is the more convenient mode of reckoning.¹ With reference to "days," consecutive days are meant, inclusive of Sundays, unless the parties are shown to have expressly intended otherwise. As to the computation of time in delivery, the modern rule, which has a general legal application, excludes the day from which computation begins; and likewise leaves out any day expressly set as a final limit under such expressions as "until," "up to," or "between." An undertaking, for instance, to deliver "in three months from April 2d," would give the seller July 2d as his last day of delivery; but his promise to deliver "between April 2d and July 2d," or at any time "until July 2d," will oblige him to deliver by July 1st.² Whether "to" shall be taken as a word of like exclusive force is not positively settled: the better opinion being, that it has sometimes the inclusive, and sometimes the exclusive, sense; and, further, inclining to give the benefit of a doubt to the party charged in the transaction with the duty of performance.³ A promise to deliver "on or before" such a day is held in some of the United States to

¹ Webb v. Fairmaner, 3 M. & W. 473; Churchill v. Merchants' Bank, 19 Pick. 532. And see Stat. 13 Vict. c. 21, § 4, which sets all doubt at rest in England. Other local statutes, as to time for delivery, may be found. See State v. King, 44 Mis. 238.

² Webb v. Fairmaner, 3 M. & W. 473; Benj Sales, bk. 4, pt. 2, c. 2; Story Sales, § 310; Farwell v. Rogers, 4 Cush. 460; Atkins v. Boylston, &c. Ins. Co., 5 Met. 440; People v. Walker, 17 N. Y. 502; Newby v. Rogers, 40 Ind. 9; Pease v. Norton, 6 Greenl. 229.

³ Conawingo Co. v. Cunningham, 75 Penn. St. 138. Says Agnew, C. J.: "This question cannot be decided by cases which interpret dubious expressions in laws or rules of court, in order to preserve rights or fulfil special purposes. What we are concerned with here is in ascertaining the meaning of the parties in this particular contract. The preposition *to* is properly applicable to *place* or *position*, while *till* or *until* properly applies to time. Yet *to* is in common parlance and sometimes in legal phraseology, applied to time. It has also various significations indicating *toward*, *to*, and *into*. In regard to time it often indicates a coming or passing into a day, as well as arrival at it." Merchandise being here deliverable "at any time from this date to December 31st," it was held that the seller had the whole of December 31st in which to deliver.

give the seller the whole of that day to make delivery ;¹ but whether “on” shall be taken as a word of inclusive or exclusive force in such a connection is still a matter of controversy in England.²

In relation to the hour of the last day which the law sets as the final limit for punctual delivery, *Startup v. McDonald* is a learned authority, which supports this distinction as a matter of law, — that, where a thing is to be done anywhere, a tender at a convenient time before midnight is sufficient; but that where the thing is to be done at a particular place, and the law implies a duty on the part of the other party to attend, that attendance is to be by daylight, and a convenient time before sunset.³ But the customary hours of business with reference to the class of transactions in question and the place of delivery ought, we think, to be regarded, so as to permit of one’s performance even after sundown, wherever the other party may, without unusual delay in closing his day’s business, give attendance to such duty as the law exacts from him in return.⁴

We next consider the *quantity* which the seller is bound to deliver. How much shall be delivered, depends upon the terms of the contract ; and, as a rule, the seller must deliver just what he has bargained to deliver, — no more, and no less. He has no right to mix the goods ordered with others not ordered, and so put the buyer to the alternative of taking the whole, or selecting his portion ; nor, in general, to deliver a quantity in excess of that ordered.⁵ The delivery of fifteen

¹ *Adams v. Dale*, 29 Ind. 273.

² See *Coddington v. Paleologo*, L. R. 2 Ex. 193, where the court was equally divided on this question.

³ *Startup v. McDonald*, 6 M. & G. 593. And see *McClartey v. Gokey*, 31 Iowa, 505.

⁴ *Ib.*; *Benj. Sales*, bk. 4, pt. 2, c. 2; *Story Sales*, § 310.

⁵ *Benj. Sales*, bk. 4, pt. 2, c. 2; *Dixon v. Fletcher*, 3 M. & W. 146; *Rommel v. Wingate*, 103 Mass. 327; *Hart v. Mills*, 15 M. & W. 85; *Cun-*

hogsheads of wine, where ten were bargained for, justifies the buyer in refusing acceptance.¹ And, even where crockery-ware was sent packed in a crate with other crockery of a different pattern, the court held that mixing the latter, which the buyer had not ordered, with the former, the true subject-matter of the sale, was a violation of the seller's duty, even though the two sets were perfectly distinguishable.² This last case, which lights the rule on its outer edge, shows us, that, even in so small a matter as throwing the *onus* of an easy selection upon the buyer, the seller runs perilous risks when he transcends the terms of the contract: he may doubtless separate the excess if he pleases, and tender seasonably what was bargained for; but he cannot so deliver as to force the buyer to assume a responsibility which the contract never meant should rest upon him.

If delivery in excess of the contract be a dereliction of duty on the seller's part, still more so is the delivery of a less quantity than that bargained for; since, in this case, no such simple act as separation could put the parties where they had agreed to stand. Where less than the quantity sold is delivered, the buyer may pointedly refuse to accept, on the ground of the seller's non-performance of a condition precedent;³ though doubtless, if he really accepts part as a substantial performance of the contract, he renders himself accountable for its value.⁴ If only a portion under an entire

liffe v. Harrison, 6 Ex. 903; *Nicholson v. Bradfield Union*, L. R. 1 Q. B. 620.

¹ *Cunliffe v. Harrison*, 6 Ex. 903.

² *Levy v. Green*, 8 E. & B. 575. Cf. *Nicholson v. Bradfield Union*, *supra*, where there was a complete mixture with the portions undistinguishable.

³ *Morgan v. Gath*, 3 H. & C. 748; *Benj. Sales*, bk. 4, pt. 2, c. 2; *Waddington v. Oliver*, 2 B. & P. N. R. 61; *Oxendale v. Wetherell*, 9 B. & C. 386; *Rockford, &c. R. R. Co. v. Lent*, 63 Ill. 288; *Wright v. Barnes*, 14 Conn. 518; *Smith v. Lewis*, 40 Ind. 98; *Marland v. Stanwood*, 101 Mass. 470.

⁴ *Oxendale v. Wetherell*, 9 B. & C. 386; *Haines v. Tucker*, 50 N. H. 307.

contract was seasonably delivered, the buyer may refuse to receive the residue.¹ But, until the period of delivery has elapsed, the seller has the opportunity of remedying errors, and making up a deficiency ; and the buyer is not, meanwhile, put to his election between returning the portion tendered on the ground of non-performance and keeping it to be paid for.² So, if the contract was for a certain quantity to be delivered in parcels from time to time, the parcels first delivered may be returned if the seller fails to deliver the latter parcels as promised ; for, when the period of delivery has elapsed, we may ask whether the total amount contracted for is already delivered.³

But, under any circumstances, substantial compliance with the contract, rather than literal fulfilment, is what the law favors ; and, where the contract itself permits of some latitude of construction as to the quantity which the seller is to furnish, the courts will avail themselves of the opportunity to give him a fair margin, while sedulous that the buyer suffers no detriment. Such expressions as “more or less,” “about,” and the cautious words “say about,” are words of estimate and expectation only, which mark the seller’s purpose not to bind himself to any precise quantity, but merely to keep reasonably close to the amount named.⁴ Thus a contract of sale of “say about six hundred spars” is substantially satisfied by a delivery of four hundred and ninety-six spars, where the contract covered all the spars of a certain description out of a specified lot, and this proved the whole quantity.⁵ The full import of such expressions is, however,

¹ *Wilson v. Wagar*, 26 Mich. 452.

² Cf. *Waddington v. Oliver* and *Oxendale v. Wetherell*, *supra*.

³ *Oxendale v. Wetherell*, 9 B. & C. 386 ; *Haines v. Tucker*, 50 N. H. 307.

⁴ *McConnel v. Murphy*, L. R. 5 P. C. 203 ; *Pembroke Iron Co. v. Parsons*, 5 Gray, 589 ; *Cross v. Eglin*, 2 B. & Ad. 106 ; *Moore v. Campbell*, 10 Ex. 323. And see, as to bills of lading, *Tamvaco v. Lucas*, 1 E. & E. 581, 592. See *Cash v. Hinkle*, 36 Iowa, 623, as to “average weight.”

⁵ *McConnel v. Murphy*, L. R. 5 P. C. 203.

a matter often of great doubt, where no criterion of quantity can be gathered from other parts of the contract to which the estimate relates.¹

To adjust the respective rights of parties under a contract which provides for delivery by quantity is a task of great delicacy. The natural meaning of the words employed should be taken, unless exceptional circumstances favor a different rule; and the spirit of the transaction should always be regarded. Thus, where "a small cargo" of wood, "in all about sixty cubic fathoms," is ordered, a delivery of the whole loading of the ship would be exacted, though amounting in fact to eighty-three fathoms, rather than suffer the seller to set apart sixty fathoms upon unloading the ship, and tender this amount only.² The courts are not seldom confronted with writings of doubtful import, where the irresistible conclusion must be that the parties did not understand their own bargain; and, after protracted litigation, the case will be decided upon its special merits, without adding any thing valuable to general principles. A contract, for instance, which provides for delivery by equal instalments, may, under the postponement from time to time of full periodical performance with the buyer's assent, and the substitution of new terms by mutual consent, become at last a riddle to solve; though here, whatever the modifications of a contract not rescinded, the seller still remains bound to make delivery at some reasonable time, and hence cannot rightfully refuse performance altogether.³ A contract of sale which is silent as to the quantity to be delivered of each of various kinds enumerated, or which fails to specify how much shall

¹ See *Bourne v. Seymour*, 16 C. B. 337; *Benj. Sales*, bk. 4, pt. 2, c. 2; *Robinson v. Noble*, 8 Pet. 181.

² *Kreuger v. Blanck*, L. R. 5 Ex. 179.

³ *Tyers v. Rosedale, &c. Iron Co.*, L. R. 10 Ex. 195 (Ex. Ch.), reversing s. c. L. R. 8 Ex. 305. And see *Ireland v. Livingston*, L. R. 5 H. L. 395; *Neldon v. Smith*, 36 N. J. L. 148; *O'Neill v. James*, 43 N. Y. 84; *Bergheim v. Iron Co.*, L. R. 10 Q. B. 319.

be delivered at each of certain fixed periods, binds the seller to deliver the full amount within the full period, but naturally leaves the quantity of each kind or of each delivery at his option.¹

A partial delivery of goods under an entire contract, even though delivery of the residue has been rendered impossible under circumstances which exempt the seller from full performance, will not enable him to enforce part performance against the buyer.²

Now as to the manner of making delivery. Separation, selection, setting apart for the buyer, — all these ideas are associated with the act of delivering chattels not specifically sold; and, beyond this, the extent of the seller's duty as prescribed by law will depend upon circumstances, — the character of the property, its situation, and the consideration whether the contract obliges him passively to let the buyer take them, or actively to forward them to him.³ A mere offer to deliver is not a sufficient compliance with the seller's engagement, to enable him to enforce his rights against the buyer: there must be either actual or constructive delivery, and at least an actual tender of the thing.⁴ But where the goods are ponderous, or where they are not in the seller's own custody, the law requires only that they shall be put under the buyer's absolute power, and that the seller surrenders whatever *indicia* of title are requisite to enable the buyer to take full possession; which constitutes constructive or symbolical delivery.⁵

¹ Metz v. Albrecht, 52 Ill. 491.

² Kein v. Tupper, 52 N. Y. 550; Story Sales, § 387.

³ 2 Kent Com. 499, 500; Benj. Sales, bk. 4, pt. 2, c. 2; Story Sales, § 311; 1 Sch. Pers. Prop. 109-111.

⁴ See Webber v. Minor, 6 Bush, 463.

⁵ 2 Kent Com. 499, 500; Benj. Sales, bk. 4, pt. 2, c. 2; Story Sales, § 311; 1 Sch. Pers. Prop. 109-111; Chaplin v. Rogers, 1 East, 192, *per* Lord Ellenborough; Ellis v. Hunt, 3 T. R. 464; Thompson v. Baltimore, &c. R. R. Co., 28 Md. 396.

These principles of familiar application in chattel transfers have already been marked; nor does delivery under a sale differ in any essential respect, save intent, from that under a gift. "The law," as was remarked in a recent case, "requires good faith and such acts only as are practicable according to the character of the thing tendered and the nature of the business."¹

Among the *indicia* of title which the seller may deliver or tender in fulfilment of his obligation under the contract is the bill of sale of a vessel, which has long been held a sufficient delivery, by way of symbol, of a vessel still at sea.² So, too, bills of lading, and various instruments in the nature of delivery orders addressed to warehousemen and other third parties who hold possession of the goods, will suffice when transferred in such form as to make the goods in another's custody deliverable to the buyer; and the delivery or tender of such documents may constitute such a sufficient performance on the seller's part as to defeat any action against him for non-delivery of the goods;³ though the seller's lien for non-payment or right of stoppage *in transitu* might not have been extinguished.⁴ Another sort of constructive delivery is that of a part for the whole, where the goods are scattered about in various places, and the simultaneous delivery of each part is impracticable.⁵ In short, wherever the seller has not expressly bound himself to special activity in placing the chattels within the buyer's control and dominion, he will have performed his part by giving the buyer every opportunity of taking possession which the nature and situation of the property fairly demand.

¹ *Hayden v. Demets*, 53 N. Y. 426, *per curiam*.

² *Atkinson v. Mailing*, 2 T. R. 462; *Gardner v. Howland*, 2 Pick. 602; 1 Sch. Pers. Prop. 111; *Story Sales*, § 311.

³ *Salter v. Woollams*, 2 M. & G. 650; *Wood v. Manley*, 11 Ad. & E. 34; *Davis v. Jones*, 3 Houst. 68; *Hayden v. Demets*, 53 N. Y. 426; *Russell v. Carrington*, 42 N. Y. 118.

⁴ See *infra* as to seller's remedies.

⁵ *Story Sales*, § 311; *Pratt v. Chase*, 40 Me. 269.

Hayden v. Demets, a New York case, illustrates the rule of constructive delivery. The contract of sale was for fifty thousand pounds of copper, to be delivered at a certain time: the price was stated as cash, to be paid on delivery. On the day specified, the seller tendered warehouse receipts of copper to the amount of forty-nine thousand nine hundred and sixty-six pounds: he offered to pay the warehouse charges, or have them deducted from the price payable; also to deliver the copper itself, if required. He had more copper on hand, sufficient to make up the slight difference. The buyer did not object on the spot to the mode of tender, nor to the amount tendered; but declined to accept, solely on the ground that he had not the money to pay for the copper, and asked an extension of time. The seller thereupon sued upon the contract; and it was held, sustaining the suit, that this tender was sufficient. Even if any objections to the form or amount of the tender existed, added the court, they had been waived by the buyer.¹

This last remark suggests that the buyer's conduct may be such as to preclude him from complaining that the tender was insufficient. A delivery of forty-nine thousand nine hundred and sixty-six pounds of copper might not, strictly speaking, have fulfilled an engagement to deliver fifty thousand pounds; but, had the buyer complained that this was less than the amount bargained for, the seller stood ready to make up the slight deficiency on the same day. And, once again, were it not clear that the seller had a right to tender warehouse receipts instead of the metal (a question which reference to business usage in aid of the contract would probably have determined), he was, at all events, prepared to tender the copper itself, if the buyer insisted upon it. We may lay it down, perhaps, that where there is doubt whether constructive delivery, instead of actual delivery, truly fulfils the terms of the contract, a constructive delivery

¹ *Hayden v. Demets*, 53 N. Y. 426.

or its tender, with an offer in the alternative to make actual delivery, is sufficient performance on the seller's part, unless, at the time, the buyer objects to the mode.¹

The effect of delivery is often considered with reference to the rights, not of buyer and seller alone, but of third persons, such as attaching creditors and subsequent purchasers. Such cases should be carefully distinguished from those now under consideration. For, as between buyer and seller, property may pass without actual delivery of the goods; and the seller performs his duty of delivery sufficiently by tendering the subject-matter for acceptance. But cases which involve the rights of third persons usually require something more,—a complete delivery; acceptance by the buyer; an actual and substantial change of possession between the parties; a transfer not only of property, but of the thing itself.² On the other hand, less might be required; for a title might pass as against creditors of the seller, where something further, such as an opportunity to inspect, might still be exacted by the buyer, as between himself and the seller, in performance of the engagement to deliver.³

Delivery to the buyer's accredited agent is equivalent to delivery to the buyer himself. Even if the seller be bound to send the goods, instead of delivering them upon his own premises, the act of performance is usually completed when he has put the goods in transit.⁴ For delivery to a common

¹ *Hayden v. Demets*, 53 N. Y. 426. And see *Alexander v. Gardner*, 1 Bing. N. C. 671; *Knights v. Wiffen*, L. R. 5 Q. B. 660; c. 8, *infra*.

² See, as to delivery against the seller's creditors, *Bullard v. Wait*, 16 Gray, 55; *Veazie v. Somerby*, 5 Allen, 280; *Wright v. Vaughn*, 45 Vt. 369; *Garman v. Cooper*, 72 Penn. St. 32; *supra*, pp. 265, 266; *McGee v. Garcelon*, 60 Me. 165; *Morgan v. Taylor*, 32 Tex. 363. Delivery of a bill of sale will not suffice where actual delivery is possible. *Burge v. Cone*, 6 Allen, 412. Severance of grass is necessary before delivery: the article must exist as a chattel. *Lamson v. Patch*, 5 Allen, 586.

³ See *Hunter v. Wright*, 12 Allen, 548.

⁴ 2 Kent Com. 499; *Story Sales*, §§ 305, 306; *Benj. Sales*, bk. 2, pt. 2, c. 6; *Thompson v. Baltimore, &c. R. R. Co.*, 28 Md. 396.

carrier is, as we have seen, presumed to be tantamount to delivery to the buyer's own agent; though, if the seller choose to keep the carrier his own agent, for his better security or other cause, the act of delivery necessarily remains incomplete while this agency continues.¹ The seller is, of course, not responsible for the risks of transit, if he has treated the carrier as the buyer's agent; but he is bound to pack in the customary and proper manner, and take other suitable precautions according to the character of the goods and their probable exposure. He must not invite injury, nor perform negligently any duties incidental to transportation which his own contract has by fair inference placed upon him.² And, in order that delivery to a carrier may be in truth a delivery to the buyer's agent, the seller is bound, in absence of special stipulations under the contract concerning the precise method of transportation, to forward the goods by the usual means of conveyance, or, at least, by such a channel as he has reason to suppose the buyer prefers.³ A proper solicitude for his own burden under the contract will further lead the seller to inform the buyer promptly of his consignment to a common carrier in all cases where he undertakes transportation from a distance; for, if he has not undertaken to control the goods on their transit as owner, he certainly has bound himself to cautious and discreet dealing with the principal, in the recognition of one who may be said to come to him from the buyer as an agent only generally accredited, and with limited authority.⁴

If a seller takes upon himself the risk of delivering into the buyer's hands, — as frequently happens, through the em-

¹ *Ib.*; *supra*, p. 268; *Dunlop v. Lambert*, 6 Cl. & F. 600; *Waite v. Baker*, 2 Ex. 1; *Magruder v. Gage*, 33 Md. 344; *Ranney v. Higby*, 5 Wis. 62; *Hall v. Gaylor*, 37 Conn. 550.

² *Supra*, p. 367; *Clarke v. Hutchins*, 14 East, 475; *Bull v. Robison*, 10 Ex. 341. See *Johnson v. Stoddard*, 100 Mass. 300.

³ *Comstock v. Affoelter*, 50 Mis. 411; *Story Sales*, § 305.

⁴ See 2 Kent Com. 500; *Bell Sales*, 89.

ployment of the seller's own agents, where he himself is at a distance, — he must stand to his risk: otherwise delivery to the carrier should absolve him from responsibility.¹ Nor is the general rule, which makes delivery to the carrier a delivery, in effect, to the buyer's agent, controlled by evidence that the seller had expressly warranted the chattels to be good up to a reasonable time after their delivery, or that he agreed to bear the loss if they were destroyed on the transit *through his own fault*; for this is different from agreeing to bear absolutely all risks of transit.² Nor does delivery to the buyer's selected agent fail to take effect, so as to pass the risks of title out of the seller, although the goods are still subject to customs-duties, the seller having done all that his contract bound him to perform.³

Where an agent comes specially accredited from the buyer to receive the goods, the seller should deal with him according to the scope of his powers. For it is to be remarked, that while the buyer may empower any one, not only to receive the goods as agent, but to make full acceptance on his behalf, a common carrier is not ordinarily to be regarded as agent for the buyer to any such extent, but only for receiving the goods.⁴ Inspection of goods supplied to order, for ascertaining that they conform to the contract, is no part, then, of a carrier's duty; and this, if not already made, or the opportunity waived, on the buyer's behalf, before the goods reach him, is a right still reserved, which the seller ought duly to respect in performing his own part of the bargain.⁵

The same principle of agency which applies to a carrier

¹ *Vale v. Bayle*, Cowp. 294; 2 Kent Com. 500.

² *Arnold v. Prout*, 51 N. H. 387.

³ *Waldron v. Romaine*, 22 N. Y. 368.

⁴ *Astey v. Emery*, 4 M. & S. 262; *Meredith v. Meigh*, 2 E. & B. 370; *Benj. Sales*, bk. 1, pt. 2, c. 4. But see *Cross v. O'Donnell*, 44 N. Y. 661.

⁵ *Isherwood v. Whitmore*, 11 M. & W. 347.

may likewise be invoked in case delivery is made to a warehouseman. Thus tobacco, which has been paid for in advance, may be boxed by the seller, marked with the buyer's name, and delivered to a warehouseman to be kept for the buyer; this being done in pursuance of the contract of sale, and in full performance of the seller's undertaking.¹ But a warehouseman who holds goods for the seller, in the first place, is regarded as the seller's agent until he attorns over in some way to the buyer, or else yields up his custody altogether.²

All incidents attending the act of delivery follow the principal thing; and the mode of performance should be throughout according to the understanding of the parties, if mutually expressed; and in whatever respect the method of delivery may have been left in doubt, the true purpose of the transaction, aided by circumstances, will be allowed full scope.³ Usage may give precision to a point which in terms has been left undefined, so far as the supposition avails that the parties knew of its existence, and contracted in reference to it. Upon evidence of usage, the Supreme Court of the United States has held that a contract to deliver so many bushels of "first-quality clear barley," meant to deliver the barley in sacks; the contract not stating whether it was to be delivered in sacks or loose.⁴

If the thing sold be already in the buyer's possession and control, the property will pass without any formal act of delivery.⁵ We may add, that, wherever delivery of possession of corporeal chattels is given conformably to the contract of sale, a bill of

¹ *Hunter v. Wright*, 12 Allen, 548.

² See *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Scudder v. Worster*, 11 Cush. 573; *Boswell v. Green*, 1 Dutch. 390; *Shepardson v. Cary*, 29 Wis. 84.

³ See *Metz v. Albrecht*, 52 Ill. 491; *Robinson v. United States*, 13 Wall. 363; *Story Sales*, § 388.

⁴ *Robinson v. United States*, 13 Wall. 363.

⁵ *Story Sales*, § 312; *Warden v. Marshall*, 99 Mass. 305; *Lake v. Morris*, 30 Conn. 201.

sale (except as to vessels) is unnecessary; such an instrument serving merely as evidence of the transfer.¹

Before passing from the subject of the seller's duties, it is proper to inquire to what extent he is personally responsible for the safety of personal property which he has sold, but not yet delivered. This must depend upon the circumstances of the sale, as evincing that the property right has or has not passed to the buyer. If the property has not passed, the seller is still owner; if it has, he is only a bailee for the buyer. As bailee, he appears to become bound to that degree of care and attention which men of common prudence bestow upon their own property, provided the buyer was not under a present obligation to remove the thing purchased.² But where the buyer is under such an obligation, — as if the time for receiving the goods has elapsed, and the buyer is at default, — the seller is responsible only for fraud or gross negligence.³ And where, upon a complete execution of the contract and the receipt of full payment, the seller consents, as a favor to the buyer, and without receiving compensation for his trouble, to take some special charge with reference to its custody or conveyance, his liability is limited to the same extent. A contract for safe-keeping, under circumstances like these, will not be inferred, but must be founded in a clearly manifested intent.⁴

On the whole, then, the seller's duty of making delivery is commensurate throughout with the scope and purpose of the contract. All acts necessarily preceding delivery, to which he may have bound himself, with reference to the subject-matter, — such as manufacturing, raising, appropriating to the contract, or putting into a deliverable condition, — must, of

¹ *Gatzweiler v. Morgner*, 51 Mis. 47.

² *Story Sales*, §§ 300, 394. And see *Bailments*, *infra*.

³ *Ib.*

⁴ *McKay v. Hamblin*, 40 Miss. 472.

course, be performed ; next, delivery itself, whether of a merely permissive character on one's own premises, or by means of a carrier, or with intent to bring the thing to the buyer's own door ; delivery in all cases being according to the nature of the subject-matter and attendant circumstances. This delivery should be fully and promptly made. Nor can the seller safely rest here, if the circumstances of the transaction are such as require more to be done in justice to the buyer before the latter can be put in default ; and this may be an opportunity for the buyer to inspect what he has ordered, or a surrender by the seller of the documents which properly accompany the goods, or some notification.¹ From first to last, the seller must perform according to the spirit of the bargain ; and when he has done so, or has fully tendered the performance of all he undertook to do, expressly or by implication, by way of condition precedent, he stands in a position to enforce the contract against the buyer, who must next perform his part, or suffer the consequences of a default. What are the buyer's duties in this exigency will be shown in the next chapter. •

¹ See, as to the requirement of delivery of a bill of lading besides the cargo, *Barber v. Taylor*, 5 M. & W. 527.

CHAPTER VIII.

BUYER'S DUTIES; ACCEPTANCE AND PAYMENT.

ANY contract may take such form as to impose a variety of duties on one or the other party: but, in contracts of sale of personal property, there are but two leading obligations exacted from the buyer; and these are,—(I.) acceptance of the chattels; (II.) payment for them. To these obligations, with their proper incidents, the present chapter will be devoted.

I. As to acceptance of the chattels. *Acceptance* is not a word which readily conveys the full idea of the buyer's obligation in our present connection; for the party accepting a thing is naturally taken as passive and inert in comparison with him who tenders it. Now, the buyer, so far from waiting in all cases for the seller to bring him the subject-matter of sale, is rather presumed, as we have shown, under an obligation to go to the seller and fetch it; the seller, not the buyer, being presumed the quiescent party, provided the minds of the parties have actually met upon a specific subject of sale for a specific price. Still the contract may have been such, that the seller stands bound, not only to take the initiative by giving notice of his readiness to deliver, but actually to deliver; to deliver, not to a carrier only, but, it may be, to the buyer's own door. In such case the buyer is the comparatively quiescent, passive party. But delivery may be made of that which is in a third person's custody; a case presumably, though not necessarily, calling upon the buyer to bestir himself, and procure a sub-delivery as soon as he has

provided himself with a delivery order or other suitable *indicia* of title from the seller. And, finally, the subject-matter sold may, at the time of the bargain, be already in the buyer's custody; in which event, neither formal delivery nor formal acceptance is needful for effecting an entire transfer of the legal title.¹ Whatever be the nature or the situation of the property bargained for, the duties of seller and buyer are reciprocal; and the measure of the buyer's duty of acceptance must be according to the plain intent of the contract, — his part being to fill out what the seller's performance has left incomplete towards effecting a legal transfer of possession and possessory rights. His duty of acceptance may bind him to take, and not merely to receive; though, indeed, he may have to do neither: but, such as the contract makes it, he must perform his obligation with zeal and discretion.

We are also to distinguish acceptance from the mere receipt of the thing. Legal acceptance under a sale includes the idea of receipt: but to receipt is superadded the element of intention to retain in accordance with the contract; that is to say, as the new owner by purchase. This latter is the strong element, after all; for, while an actual receipt by virtue of the purchase is not always requisite, there must be in every case the intention to retain in accordance with the bargain, else the contract has never been completely executed. Acceptance signifies, not only that the thing is received, but that it is received in satisfactory fulfilment of the seller's obligation to deliver, as a full compliance with the bargain previously entered into.²

Now, supposing the seller to have performed all that was needful on his part in tendering delivery of the goods, what is incumbent on the buyer? In the first place, the buyer must, with reasonable promptness, put himself where the goods shall come into his own possession, without subjecting

¹ See, *supra*, pp. 396–400.

² See Benj. Sales, bk. 4, pt. 3, c. 1; Story Sales, §§ 404–408.

the seller to further risk or trouble ; sending for them, as the ordinary presumption goes ; at all events, holding himself prepared to receive them at the proper time, in the proper place, and in the proper manner, according to the terms of the bargain. The buyer's performance of this obligation must be adequate to the occasion ; and for unreasonable delay in receiving or taking possession he subjects himself to liability for such extra charges and expenses as may be incurred in the custody of the goods, besides running the risk of damage and loss. What is an unreasonable delay must depend upon circumstances. The seller who does his own part stands clear : but prudence requires him to notify the buyer in case of doubt ; and for a simple, unexplained delay on the buyer's part in coming to take the thing away, the seller would hardly be justified in treating the bargain as rescinded.¹

But the buyer is not obliged to carry his receipt of possession to the full extent of acceptance with his eyes shut. Every contract of sale calls for a rational interpretation ; and where, under the peculiar circumstances, that inspection which shall show whether the chattels tendered by the seller are such as were bargained for must necessarily await their actual receipt, the law leaves an opening. The instances in point have been incidentally considered already, and chiefly concern unascertained chattels made or supplied to order. Thus, the bulk being delivered under a sale by sample, the buyer ought to be allowed an opportunity to compare and ascertain for himself the substantial correspondence of bulk and sample.² He is not obliged to keep goods sent to his order without ever being allowed to inspect them. Even if specific goods were mutually agreed upon, which the seller has undertaken to send home to the buyer, the seller cannot

¹ Story Sales, § 404 ; Benj. Sales, bk. 4, pt. 3, c. 1.

² Lorymer v. Smith, 1 B. & C. 1 ; *supra*, pp. 321, 371 ; Couston v. Chapman, L. R. 2 Sc. App. 250.

rightfully deprive the buyer of the opportunity, upon their arrival, to remove the wrappers, or break the package, so as to make sure that the identical thing is brought him.¹ Nor is the buyer, any more than the seller, obliged to go beyond his fair share in fulfilment of the contract. It may accommodate, to be sure, for the buyer to select his own goods from a larger quantity offered him, or to accept part performance, or to wait unreasonably long at his place of business in order that the delivery may be complete, and all be found satisfactory; but his obligation to do so is a very different matter.² "In a word," says one writer, "as delivery and acceptance are concurrent conditions, it is enough to say that the vendee's duty of acceptance depends altogether upon the sufficiency or insufficiency of the delivery offered by the vendor."³ And whether in the course of inspection the buyer has a right to fully weigh, measure, or manipulate the goods, must depend upon the circumstances of the case and the reasonable intent of the contract; this being certain, that the buyer must not go beyond its proper import, and make delay or expose the thing to injury in carrying out an inappropriate examination. He might well be permitted to weigh or measure if his liability to pay depended upon the exact weight or measurement, and no final test had already been applied; but such acts are clearly superfluous where he has bound himself to pay so much for the thing as it stands.⁴

Acceptance of goods in the fullest sense may be expressed by words or acts; and it is likewise inferable from the facts. A detention of custody by the buyer becomes, in the lapse of time, decisive of the question; for, should he mean for cause not to accept the goods, it is his duty to promptly refuse to

¹ *Isherwood v. Whitmore*, 10 M. & W. 757; *supra*, pp. 324, 325.

² *Startup v. Macdonald*, 6 M. & G. 593; *Hart v. Mills*, 15 M. & W. 85; *Kein v. Tupper*, 52 N. Y. 550; *supra*, pp. 405, 406, and cases cited.

³ *Benj. Sales*, bk. 4, pt. 3, c. 1.

⁴ See *Pettitt v. Mitchell*, 4 M. & G. 819.

keep them, and to throw them back upon the seller.¹ An American case in point is *Treadwell v. Reynolds*. A., through his agent, bought wool of B., whose name and address he did not know; but his agent did. Three days after the wool was delivered, A. notified his agent that he refused to accept the wool; making no objection to the quantity or quality, but merely for the delay of its delivery. He did not tell his agent to notify B. of this refusal; nor did he take any steps to find out B.'s address, or to bring the matter to his knowledge, until six weeks after the wool had been delivered. The wool had meantime fallen in market-value, and B. supposed all the time it had been sold. It was very properly ruled, that A., by retaining the wool so long, had become fully liable for the price.² Even the three days' detention, which might possibly have been allowed for testing the quantity and quality, seems to be an unreasonably long period for deciding, as in this case, to refuse acceptance on the mere ground of a delayed delivery;³ for, in estimating how long a period of detention is consistent with the buyer's purpose of refusing acceptance, it is material to consider the grounds on which such refusal is based. Still more conclusive upon the buyer is a detention of custody accompanied by the exercise of acts of ownership over the chattels, such as the attempt to sell the property over as one's own before giving notice of non-acceptance.⁴ Whether the buyer has put himself without

¹ Story Sales, § 405; Benj. Sales, bk. 4, pt. 3, c. 1; *Bianchi v. Nash*, 1 M. & W. 545; 2 Pars. Contr. 221; *Couston v. Chapman*, L. R. 2 Sc. App. 250; *Treadwell v. Reynolds*, 39 Conn. 31.

² *Treadwell v. Reynolds*, 39 Conn. 31.

³ *Ib.* But in *Sanders v. Jameson*, 2 C. & K. 557, a usage of the Liverpool corn-market, allowing the buyer but one day to object that corn sold was not equal to the sample, was held to be reasonable. In *Couston v. Chapman*, L. R. 2 Sc. App. 250, a period of about seven weeks was thought by Lord Chelmsford to be too long for examining large lots of wine sold by sample: a week, he said, would have sufficed.

⁴ *Parker v. Palmer*, 4 B. & A. 387; *Chapman v. Morton*, 11 M. & W. 534; Benj. Sales, bk. 4, pt. 3, c. 1; Story Sales, § 405.

the pale of the law, in this respect, must depend upon all the facts, not upon words alone which are not borne out by the buyer's own conduct. An evasive, shuffling course of procedure will not answer; nor can the buyer's refusal of acceptance avail him when (to use Lord Abinger's expression) he has exposed himself to the imputation of playing fast and loose, declaring that he will not accept the goods, but at the same time preventing the seller from dealing with them as his own.¹

In *Couston v. Chapman*, a person had ordered from public auction various lots of wine, as *per* sample. The wine was delivered on the 11th of April; the buyer examined it, and on the 31st of May wrote to say that two lots were objected to, but that he was willing to pay for the rest, and also, when supplied according to the sample, for these lots. In the same letter he stated the damages which he wished allowed him for breach of contract. The seller rejected this proposal; and the controversy was carried on by letter until June 13th, when the seller sued. The buyer had kept all the lots, neither paying, nor tendering pay, for what he admitted were satisfactory. It was decided (the case going up to the House of Lords among the Scotch appeals) that the sale of each lot was a separate contract; that, if the lots objected to were inferior to the sample (as was evidently the case), the buyer, being unwilling to keep them, should reject and return each of them; that, if the seller would not acquiesce in the rejection, the buyer ought to place them in neutral custody, giving the seller notice; and that a buyer has no right to hold to the contract, and ask for other goods than those he rejects.² "Where a party," says Lord Chelmsford, "desires to rescind a purchase upon the ground that the quality of the goods does not correspond with the sample, it is his duty to make a

¹ *Chapman v. Morton*, 11 M. & W. 534, *per* Lord Abinger.

² *Couston v. Chapman*, L. R. 2 Sc. App. 250.

distinct offer to return, or, in fact, to return, the goods, by stating to the vendor that the goods are at his risk ; that they no longer belong to the purchaser ; that the purchaser rejects them ; that he throws them back on the vendor's hands ; and that the contract is rescinded." This important decision shows how carefully the buyer must avoid crippling himself by trying to bear off too many advantages, — negotiating for a favorable settlement of the seller's breach, while clinging to the goods which he professes to have rejected ; that he should put his refusal of acceptance so plainly and so promptly before the seller, as to leave no doubt of his real intention in the premises, and get rid of the custody of the goods as soon as possible, unless he has concluded to keep them. It is only where the buyer, by some artifice of the seller, or under other circumstances imputing to himself no negligence, is really deprived of his proper opportunity to examine, that his right of acceptance, after the seller has tendered delivery, may long remain in abeyance.¹

On the other hand, the buyer who means to refuse acceptance for cause is not narrowed to a technical performance of his duty : for the real object which the law keeps in view is, that the other party shall receive such formal and distinct notice of non-acceptance that he may secure his own interests, and perform seasonably what is incumbent upon him in return ; and with this it is satisfied. Thus, where the buyer met the seller on the day of delivery, and told him that the goods delivered were still on his premises, that they were bad, that he would not have them nor pay for them, and that the seller might do what he liked with them, it was held that he had sufficiently performed his duty, and was not liable for the price.²

¹ See *Dutchess Co. v. Harding*, 49 N. Y. 321.

² *Grimoldby v. Wells*, L. R. 10 C. P. 391. It was here said that the buyer need not offer to send the goods back, nor place them in neutral custody. But cf. *Couston v. Chapman*, *supra*.

The seller may have waived strict notice of non-acceptance and return of the goods by entering into some special arrangement inconsistent with enforcing such requirements. Thus where the buyer and the seller's agent agree that if the goods sent are not satisfactory the buyer need not accept them, but shall retain them until the agent returns to the buyer's shop, the buyer is excused from giving an earlier notice of his refusal to accept.¹

Where delivery is made by instalments, the buyer's acts of acceptance should naturally correspond; so that the buyer's acceptance of the first instalment will not debar him from rejecting, on proper grounds, the portions subsequently delivered.² But, of course, a buyer may acquiesce in modifications of the original contract of delivery, so as to be bound to new terms of acceptance, — a state of things which often occurs under instalment contracts.³ Yet the act of final acceptance once completed, under a contract of sale, the buyer is precluded from asserting afterwards that the goods were not of the quality or quantity agreed, unless he can show fraud or a warranty. This rule holds true, even though the goods contracted for were to be of various qualities, and situated in various places; as where, in a sale of lumber at so much for "prime," so much for "merchantable," and so much for "refuse," a buyer had receipted, after full opportunity to examine the entire lot, for a described quantity of each.⁴ This subject of acceptance will come up once more in connection with the Statute of Frauds.⁵

II. As to payment for the chattels. To settle for what he has bought in conformity with the terms of the bargain is the

¹ *Suit v. Bonnell*, 33 Wis. 180.

² *Hubbard v. George*, 49 Ill. 275.

³ See *Haines v. Tucker*, 50 N. H. 307; *supra*, p. 407.

⁴ *McCormick v. Sarson*, 45 N. Y. 265. And see *Gilson v. Bingham*, 43 Vt. 410.

⁵ *Infra*, cs. 9, 10.

last duty of the buyer, and quite commonly the final act of performance which renders the contract of sale fully executed. Payment of the price may be of three sorts : (1st) in cash ; (2d) by a present adjustment not in cash, as where the buyer gives his notes for the price ; (3d) on credit. And the mode of payment in any case will depend upon the agreement, express or implied, of the parties.

(1st.) As to payment in cash. Where there is nothing in the contract to the contrary, payment in cash as soon as the bargain is struck is the rule ;¹ and, even if the seller has bound himself to make delivery upon the understanding that no title shall vest in the buyer until the thing sold is paid for, a cash payment will be exacted from the buyer concurrent with delivery, according to the universal presumption.² In the former instance, the buyer ought not to wait until a demand is made upon him for the price ; for as it is his duty to fetch the goods from the seller's premises within a reasonable time, so ought he, at the same time, to offer that payment without which he can have no right to remove them.³ In the latter instance, payment and delivery being in the nature of mutual conditions precedent or concurrent, the tender of the goods after the manner agreed upon serves itself as a demand of their price.⁴ Where, however, provision is made that the price shall be payable only after some formal demand or notice, the buyer should be allowed a reasonable time both for getting his notice and for complying with it.⁵

The time and manner of the buyer's performance of this

¹ Story Sales, § 403; Benj. Sales, bk. 4, pt. 3, c. 2; *supra*, p. 227; *Martineau v. Kitching*, L. R. 7 Q. B. 436.

² *Supra*, p. 290; *Farlow v. Ellis*, 15 Gray, 29; *Hammett v. Linneman*, 48 N. Y. 399; *Brehen v. O'Donnell*, 34 N. J. L. 408; *Metz v. Albrecht*, 52 Ill. 491; *Cassell v. Backrack*, 42 Miss. 56; *Goldsmith v. Bryant*, 26 Wis. 34.

³ *Supra*, pp. 396, 417.

⁴ *Supra*, p. 291.

⁵ *Brighty v. Norton*, 3 B. & S. 305; *Massey v. Sladen*, L. R. 4 Ex. 13.

obligation to pay the price must depend greatly upon the natural sequence of mutual stipulations in the contract. Thus, under a sale of marble which provides for a measurement to be stated at length at the seller's instance, the payment to be based upon this statement, the buyer is not bound to pay or tender payment for the marble before the statement is presented; and for the seller's failure to measure, and make the statement, he may sue as for breach of contract.¹

An entire contract, though involving part deliveries, does not oblige the buyer to make payment until the seller has delivered or tendered the entire quantity; with this reservation, of course, that the buyer takes care not to so finally accept goods tendered in part performance as to bind himself for a corresponding price.² Nor can a buyer, by offering part payment under an entire contract, claim an equivalent portion of the goods, though they happen to be divisible.³ But that which at first glance might be mistaken for an entire contract is frequently found to be an aggregate of separate bargains, each with its attendant liabilities.⁴ Where this is the case, the buyer is bound to punctual payment for each lot; and it is even held that the seller thus entitled to his pay for each delivery does not waive his right, but may treat the contract as broken by a single failure to make payment upon tender of delivery, although he has repeatedly delivered loads without payment, and has given the buyer no notice of his intention to insist upon the terms of the bargain.⁵

We have shown that where a legal transfer of property right in a chattel has taken place, although the thing be destroyed before it reaches the buyer, he is responsible for

¹ Lowry v. Barelli, 21 Ohio St. 324. And see *supra*, p. 282.

² Oxendale v. Wetherell, 9 B. & C. 386; *supra*, pp. 407, 408.

³ Story Sales, § 403.

⁴ See Couston v. Chapman, L. R. 2 Sc. App. 250.

⁵ Gardner v. Clark, 21 N. Y. 399. But great laxity in carrying out such a bargain might go to show that the parties had mutually consented to modify the original terms of the contract.

the price ; and that the same consequences must ensue wherever the buyer assumes the risks of delivery. So, too, if the buyer has paid cash in advance of delivery, he cannot, under such circumstances, claim to recover it.¹ It matters not that the goods are still in the seller's possession, save so far as this may aid in proving that property had not yet passed under the contract, as mutually intended ; for, when a transfer of property has taken place, the seller's possession is only that of bailee for the buyer, and his liability a limited one accordingly.²

The buyer's common obligation to pay cash is capable of being varied by circumstances, according to the different shades of intent in a contract. Not payment alone relieves him from responsibility, but a tender of what is due will suffice ; and as to payment and tender under a sale, we are led to apply constantly the ordinary rules as between debtor and creditor.³ Payment should be made under the seller's directions, and in the manner, and with the precautions, which he may have chosen to prescribe. To guard himself against liability to loss in transmitting what is due, the buyer should not send through the mail when he is requested to send by express ; nor by ordinary letter, when a registered letter is called for ; nor by any unusual conveyance involving extra risks, without direction : and, whenever exact compliance with the seller's orders is impossible, he should tell him so, and get a change of direction, rather than employ any more hazardous course of transmission.⁴ Payment of a debt is not proved merely by showing that the amount was duly deposited in the post-office, directed to the creditor, unless that mode was authorized by the creditor expressly, or by implica-

¹ *Supra*, cs. 2, 3 ; *Rugg v. Minett*, 11 East, 210 ; *Castle v. Playford*, L. R. 5 Ex. 165 ; 7 Ex. 98 ; *Martineau v. Kitching*, L. R. 7 Q. B. 436.

² See *supra*, p. 415.

³ See 1 Sch. Pers. Prop. 455, 473-480.

⁴ *Williams v. Carpenter*, 36 Ala. 9 ; *Benj. Sales*, bk. 4, pt. 3, c. 2 ; *Gordon v. Strange*, 1 Ex. 477 ; *Caine v. Coulson*, 1 H. & C. 764.

tion from the contract and the usual course of dealing ; but the risk continues the vendor's until the money is duly received at its place of destination.¹ But a tender of cash payment for goods sold is usually made to the seller or his agent on the spot where the buyer is bound to accept them ; acceptance and payment being simultaneous acts, and the seller or his representative putting himself before the buyer to receive what is due him. The time and place of payment are, therefore, easily fixed in the majority of cash sales. Should the buyer have agreed to pay at any particular time or place, his undertaking will be construed after the same fashion as the seller's promise to deliver.²

A tender of money should be, as we have seen, in the lawful coin of the country, or such paper-money as the constitution and laws may have legalized for that purpose : but a tender in bank-notes, or even foreign money, will answer, if not objected to at the time ; and the buyer's check is frequently accepted in payment, on the supposition that it will be duly honored at the bank on which it is drawn.³ But parties may expressly agree that payment shall only be made in coin of a certain kind, or in a certain commodity.⁴ The exact amount due should be tendered,—that is to say, an amount of money equal to the price of the goods ;⁵ not less than the proper amount, under any circumstances, save that one who owes several distinct debts may always make a tender sufficient for any one of the debts he chooses to

¹ *Ib.* ; *Gurney v. Howe*, 9 Gray, 404.

² *Bac. Abr. Tender*, B. 2 ; *McClartey v. Gokey*, 31 Iowa, 505 ; *supra*, pp. 400, 401.

³ 1 Sch. Pers. Prop. 447, 455, 456 ; *Hallowell Bank v. Howard*, 13 Mass. 234 ; *Pickard v. Bankes*, 13 East, 20 ; *Ehrensperger v. Anderson*, 3 Ex. 148 ; *Legal Tender Cases*, 12 Wall. 457 ; *Polyglass v. Oliver*, 2 Cr. & J. 65 ; *Benj. Sales*, bk. 4, pt. 3, c. 2.

⁴ 1 Sch. Pers. Prop. 447 ; *Legal Tender Cases*, 12 Wall. 457.

⁵ See 1 Sch. Pers. Prop. 474, 475 ; 1 *Smith Lead. Cas.* 439 ; *Dixon v. Clarke*, 5 C. B. 365.

specify.¹ But a tender of more than the amount due is good, on the maxim that the greater always contains the less, though not to the extent of putting an unwilling creditor to the trouble of making change ; since it is the debtor, and not the creditor, who has the duty to perform.² A tender of a gross sum due on several demands, without designating the amount tendered upon each, is sufficient.³

This duty of payment or tender on the buyer's part is subject to the qualifications usually attendant upon the performance of a condition precedent.⁴ A legal tender, strictly speaking, requires the production of the money in the seller's presence ; and yet the latter's conduct may amount to a waiver of its production, and so exonerate from strict performance a buyer who has done all that the case fairly admitted. The cases are quite numerous as to what is or is not a sufficient waiver of full tender on the creditor's part. They establish that a debtor must, in general, not only have the money about him, but actually produce it before the seller ; that it is not enough for some one else to have the money who can readily be summoned, nor that the debtor has it in his own pocket. The sight of money will often tempt a hesitating creditor to yield ; and hence, if the correct sum in cash can be shown him in such a manner that the creditor may examine and count it over, the debtor should not stop short of so producing it before him ; though it would be for the creditor, and not for the debtor, to count it over, and verify the amount. Where the money is contained in a bag, purse, or package, which requires to be opened, it is safer for the buyer to open it, and bring forth

¹ *Ib.* ; *Thetford v. Hubbard*, 22 Vt. 440.

² *Benj. Sales*, bk. 4, pt. 3, c. 2 ; *Dean v. James*, 4 B. & Ad. 546 ; *Watkins v. Robb*, 2 Esp. 711.

³ *Thetford v. Hubbard*, 22 Vt. 440.

⁴ *Dickinson v. Shee*, 4 Esp. 68 ; *Leatherdale v. Sweepstone*, 3 C. & P. 342 ; *Hazard v. Loring*, 10 Cush. 267 ; *Searight v. Calbraith*, 4 Dall. 325 ; *Bakeman v. Pooler*, 15 Wend. 637 ; *Sargent v. Graham*, 5 N. H. 440 ; *Knight v. Abbott*, 30 Vt. 577.

the contents, in order that the tender may be full at all points ; and, if he does not show plainly just what he has, he should, at any rate, state its amount. But where the creditor checks the tender by positively refusing to take the money, or by leaving the buyer's presence, the debtor having done all he reasonably could, meanwhile, by making known his purpose and beginning to execute it, the actual production of the money will be dispensed with, and the debtor becomes entitled to the legal advantage of a tender.¹ So may a waiver of full tender be inferred where the seller refuses to take the sum which is offered him, and requires costs or other additional charges to be added which the debtor is under no obligation to pay.²

A tender, to be good, must be free from all superfluous conditions or qualifications to which a creditor might rightfully object. Thus a debtor cannot insist, according to some authorities, that the creditor shall admit in receiving the amount tendered him that nothing more is due, or give an acquittance in full of all demands ; nor, indeed, would it be essential for the buyer's own protection, in making the payment, that the receipt should be in full.³ But the debtor may exclude any harsh legal presumption against himself by his method of tendering : he may say, without insisting upon an acknowledgment from the other party, that he tenders this in full of all demands.⁴ So, too, is a tender good, though accompanied by a protest that the amount paid was not lawfully due.⁵ It would appear, too, notwithstanding the adverse

¹ *Breed v. Hurd*, 6 Pick. 356 ; *Douglas v. Patrick*, 3 T. R. 683 ; *Alexander v. Brown*, 1 C. & P. 288 ; *Wheeler v. Knaggs*, 8 Ohio, 169 ; *Thorne v. Mosher*, 5 C. E. Green, 257.

² See *Ashburn v. Poulter*, 35 Conn. 553.

³ *Eckstein v. Reynolds*, 7 Ad. & E. 80 ; *Bowen v. Owen*, 11 Q. B. 130 ; *Hepburn v. Auld*, 1 Cr. 321 ; *Brooklyn Bank v. De Grauw*, 23 Wend. 342 ; *Richardson v. Boston Chemical Laboratory*, 9 Met. 42.

⁴ *Robinson v. Ferraday*, 8 C. & P. 752 ; *Bull v. Parker*, 1 Q. B. 409 ; *Bowen v. Owen*, 11 Q. B. 130. But see *Sutten v. Hawkins*, 8 C. & P. 259.

⁵ *Scott v. Uxbridge R. R. Co.*, L. R. 1 C. P. 596.

attitude of some of the earlier decisions, that the debtor has a right to request a receipt for what he pays over.¹ But the right to require a receipt might depend upon circumstances. Large sales of personal property, as, for instance, of a cargo of merchandise, are often accompanied by invoices and other vouchers which are transferable upon receipt of payment: in small sales by retail, delivery of the goods will often sufficiently show that the cash has been paid; while, again, it is quite customary in a sale to give the buyer a bill of items which the seller receipts at the foot upon getting his money.

The object of a tender is to relieve the buyer from the imputation of default, and to save all possible accruing damages and interest; not, of course, to avoid the liability of ultimately paying the principal sum. It means, in a sale, that the buyer admits himself bound to pay a certain amount in discharge of the seller's claim, and no more. Hence, if his tender is once refused, the debtor must hold himself still ready to pay over whenever the creditor finally concludes to accept the sum offered, and demands it at any reasonable time or place.² If suit be brought for the price, the practice is to pay the money into court, and abide by the result of the trial.³ Meantime the buyer may keep it, or put it on deposit; though it should be added, that he cannot compel the creditor to look to any depositary for the money, but must charge himself with the duty of fetching it. If the debtor, upon the creditor's subsequent reasonable demand, does not pay or tender what is due, he will lose the benefit of his previous tender.⁴

The result may be modified in a given case by the acts and

¹ In England, the point is settled by legislation in the buyer's favor. Stat. 16 & 17 Vict. c. 59, §§ 3, 4; Benj. Sales, bk. 4, pt. 3, c. 2. See *Richardson v. Jackson*, 8 M. & W. 298; *Wood v. Hitchcock*, 20 Wend. 47.

² *Town v. Trow*, 24 Pick. 168.

³ See *James v. Vane*, 2 E. & E. 883.

⁴ *Town v. Trow*, 24 Pick. 168; *Middlesex v. Thomas*, 5 C. E. Green, 39.

conduct of the parties. Thus payment is good where the person to whom it is made refuses to accept, if the money is left with him against his wish, and he afterwards refuses to give it up.¹ But the debtor should see that his tender is accepted as he made it, if at all; for if one tenders to his creditor a sum of money in full of all legal claims which the latter may have against him, and the creditor receives it, protesting that it is not enough, but that he will pass it to the debtor's credit upon account, the debtor, by not dissenting to this mode of acceptance, remains liable still for whatever the creditor may afterwards recover against him in excess of the amount tendered.²

(2d.) As to payment by a present adjustment not in cash. By paying in whatever circulates as money, the intention manifested is to make a cash adjustment for the goods: and so substantially is it when the buyer gives an ordinary check; for this is merely a convenient method of effecting the same practical result.³ But when a bill or note is given, there is no cash adjustment of the price: either the instrument stands as a postponement of payment, or its accepted substitute.⁴ Which of these it shall be is always a question of intention. Now, a buyer may give his own note simply, or his note strengthened by indorsement or other security, or some one else's note; and a similar principle applies to a bill of exchange; each of which three modes should be distinguished when we treat of adjusting the price.

Where a buyer gives his own note, or accepts the bill which the seller has drawn against the goods, and the goods

¹ *Rogers v. Rutter*, 11 Gray, 410.

² *Gassett v. Andover*, 21 Vt. 342. As to appropriation of payments, see 1 Sch. Pers. Prop. 478.

³ 1 Sch. Pers. Prop. 456.

⁴ 1 Sch. Pers. Prop. 456; *Cary v. Bancroft*, 14 Pick. 315; *Ward v. Smith*, 7 Wall. 447.

are thereupon delivered up, the presumption of the common law would be that the seller takes the instrument, not by way of absolute discharge of the price, but as a postponement of payment only ; the result of which is that the seller's right to sue for the price revives on the non-payment of the paper at maturity.¹ But in some States the rule is, that, where one indebted gives his note or acceptance for the debt, there is *prima facie* an absolute payment made to the creditor.² There is, however, never more than a *prima facie* presumption ; and, any presumption, on the one side or the other, may be rebutted by evidence that the parties intended otherwise.³ It is a reasonable custom, well established to be sure, that where one sells upon a long credit, and for a large amount, the buyer shall give him his note for the price ; this being no more onerous to an honest buyer, while positively advantageous to the seller in affording written proof of the debt, and giving him something upon which he may raise the money elsewhere.⁴ But, since we are regarding intention, the effect of giving such a note or bill may be shown in any case to mean that the buyer will be no longer liable for the price of the goods, although he may still be liable on the instrument ; and among circumstances which lead to this conclusion, or, in other words, warrant the inferences that payment was meant to be absolute, is the fact that buyer had offered to give his time note for the price, or pay cash less

¹ 1 Sch. Pers. Prop. 476 ; Benj. Sales, bk. 4, pt. 3, c. 2 ; Owenson v. Morse, 7 T. R. 64 ; Griffiths v. Perry, 1 E. & E. 680 ; Story Sales, § 219. This is the rule in England ; also in New York, New Jersey, and many other American States. *Ib.* See *Middlesex v. Thomas*, 5 C. E. Green, 39 ; *Smith v. Miller*, 43 N. Y. 171 ; *Archibald v. Argall*, 53 Ill. 307.

² Story Sales, § 219 ; *Fowler v. Bush*, 21 Pick. 230 ; 1 Sch. Pers. Prop. 476 ; *Melledge v. Boston Iron Co.*, 5 Cush. 158 ; *Ferry v. Baxter*, 13 Vt. 452 ; *Costar v. Davies*, 3 Eng. 213 ; *Paine v. Dwinel*, 53 Me. 52. Maine, Vermont, and Massachusetts are among the States which are committed to this rule.

³ 1 Sch. Pers. Prop. 476.

⁴ See *Whitney v. Eaton*, 15 Gray, 225.

discount, and the seller chose the former in preference.¹ In any event, the seller is bound to account for the instrument he has taken, so as to save the buyer harmless before he can recover for his price ;² and any holder must take the proper steps for presentment on maturity, so as not to endanger the rights of the buyer with reference to other parties, else the instrument may operate as absolute payment.³

If a buyer adjusts the price by giving his note or acceptance with security, it is still a matter of evidence whether this was taken by the seller as an absolute or a conditional payment ; but the former might well be presumed. One mode of enlarging the buyer's obligation to pay the price is by giving negotiable paper on which is the name of some other party.⁴ The seller must here, as before, pursue his rights, so as not to deprive the buyer of his own remedies against others, nor subject him to special risks beyond what he had agreed to assume.⁵

A mode of payment not uncommon in England, where a large quantity is to be delivered by instalments, is for the buyer to accept the seller's time drafts against inspectors' and wharfingers' certificates, showing that the goods are ready for shipment. In such cases, the seller may require the buyer's acceptance as a condition precedent or concurrent to giving the certificate.⁶

An adjustment of the price by another party's bill, note, or other obligation, follows much the same course as sales for a price payable in stock, clothing, and the like commodities ;

¹ *Cowasjee v. Thompson*, 5 Moore P. C. 165.

² *Price v. Price*, 16 M. & W. 232; *Bunney v. Poyntz*, 4 B. & Ad. 568.

³ See *Camidge v. Allenby*, 6 B. & C. 373; *Mehlberg v. Fisher*, 24 Wis. 607; *Hopkins v. Ware*, L. R. 4 Ex. 268; *Middlesex v. Thomas*, 5 C. E. Green, 39; *Story Sales*, § 434.

⁴ *Sard v. Rhodes*, 1 M. & W. 153; *Camidge v. Allenby*, 6 B. & C. 373; *Mehlberg v. Fisher*, 24 Wis. 607; *Peacock v. Pursell*, 14 C. B. N. s. 728; *Rice v. Andrews*, 32 Vt. 691.

⁵ *Ib.*

⁶ *Gunn v. Bolcklow*, L. R. 10 Ch. App. 491.

the giving of such equivalent amounting to absolute payment in most instances.¹ Wherever securities thus given turn out to be forged or counterfeit, the seller can rescind the adjustment, on the ground that the consideration has failed ; and if, though genuine, they were worthless, and the buyer knew them to be so, the imputation of fraud might afford relief in like manner.² And, since the question of payment must still be viewed in the light of mutual intention, even the buyer's good faith in passing over a worthless security will not always cause the transaction to stand as a satisfaction of the debt.³ But the buyer's rights must still be respected, whatever the character of the adjustment ; and if the creditor fails to exercise due diligence in collecting the security, or to give such notice to the buyer as may enable him to pursue his legal remedies against the parties liable thereon, the buyer will be relieved from further obligation ; for either the seller took the instrument in question absolutely and as a full equivalent of the price, or else, receiving it conditionally, he thus discharges the buyer by his own laches.⁴

Where a seller has agreed to receive the notes of a third party in payment for the goods sold, he is not bound to deliver up the goods upon tender of the notes if such third party has become meanwhile insolvent.⁵ The case is somewhat analogous to that of stoppage *in transitu* against an insolvent buyer.⁶

The adjustment of price agreed upon may be partly in cash,

¹ See *Humaston v. American Telegraph Co.*, 20 Wall. 20; *supra*, p. 196; *Wise v. Chase*, 44 N. Y. 337; *Read v. Hutchinson*, 3 Camp. 352; *Gidney v. Altman*, 27 Mich. 226; *Hale v. Hays*, 54 N. Y. 389.

² 1 Sch. Pers. Prop. 591-594; *supra*, p. 323; *Goodrich v. Tracy*, 43 Vt. 314.

³ See *Roberts v. Fisher*, 43 N. Y. 159, where the note of a party already insolvent was given; *Weddigen v. Boston, &c. Fabric Co.*, 100 Mass. 422, the case of a third person's worthless check.

⁴ *Camidge v. Allenby*, 6 B. & C. 373; *Smith v. Mercer*, L. R. 3 Ex. 51.

⁵ *Benedict v. Field*, 16 N. Y. 595. And see *Ex parte Chalmers*, L. R. 8 Ch. 289.

⁶ See c. 14, *post*.

and partly on credit; or it may have been optional as between the two modes on either side.¹ But, whatever the mode adopted for absolute or for conditional payment, the buyer is bound to perform strictly as he has agreed to do; otherwise the seller's remedies are left open for recovering without delay the full contract price.² The rule of negotiable paper here finds expression; and where the buyer is primarily liable on an instrument, and has lost no recourse against others nor incurred special hazard by the seller's acts with reference to the security given, he cannot set up the seller's laches to prevent the enforcement of his own express obligation.³

Where a sale was made on an adjustment by bills at two and four months, Lord Ellenborough once held that the seller was bound to accept the bills offered within a reasonable time; and that five days was a period unreasonably long for that purpose.⁴

(3d.) As to sales on credit. Here the mutual understanding is, that the buyer shall have full right and title to the thing sold, and that the seller shall wait for his pay. Credit may be given for a definite or for an indefinite period, in which latter case a reasonable time is to be presumed; and it may either rest in an express agreement, or be inferred from the parties' course of dealing and other circumstances. As the giving of credit derogates from the seller's rights, it should never be presumed, where the buyer was an utter stranger to him; for the foundation of credit is the personal confidence which the creditor reposes in his debtor's honor

¹ *Rugg v. Weir*, 16 C. B. N. s. 471; *Gray v. White*, 108 Mass. 228.

² *Rice v. Andrews*, 32 Vt. 691; *Gray v. White*, 108 Mass. 228; *Rugg v. Weir*, 16 C. B. N. s. 471.

³ See *Atkinson v. Handon*, 2 A. & E. 628; *Benj. Sales*, bk. 4, pt. 3, c. 2. And see, generally, 1 Sch. Pers. Prop. pt. 3, cs. 7, 8.

⁴ *Hodgson v. Davies*, 2 Camp. 530. The mercantile expression "approved bills" is here held to mean bills which in reason ought to be approved as unobjectionable.

and ability to pay when the time comes round. As to sales of this character, delivery is completed, and the buyer has all the advantages of ownership : but he is not obliged, in turn, to pay before the expiration of the term ; and if he gives his note in postponement of payment, by way of evincing the length of the term, the seller must wait till the time runs out before he can sue.¹ Where no time of credit definitely fixed by express agreement or custom can clearly be shown, payment on the seller's demand seems to be the legal requisite ; in which case the seller should put the buyer in default, by sending his bill or other notification that he desires settlement for the goods, — a course prudent in any case of expired credit.² The buyer's duty as to payment or tender, on the lapse of his term of credit, is substantially the same as in the other cases we have just considered.

If the seller has given credit conditionally, — as, for instance, upon the buyer's giving him certain periodical acceptances or notes, — and the buyer breaks the condition, the consideration for the credit fails ; and the seller may thereupon sue at once for his price, without awaiting the expiration of the proposed term of credit.³ But the seller may in any case, by waiving exact fulfilment of a condition, enlarge the buyer's opportunity for performance.⁴

Payment may be made through agents as well as their principals ; but to make sure that one has authority, as the seller's agent, to receive the price or modify the terms of payment, is the practical difficulty. One who acts within the reasonable scope of his powers as held out by his principal

¹ Story Sales, §§ 236, 237, 403 ; *Stedman v. Gooch*, 1 Esp. 5 ; *Rugg v. Weir*, 16 C. B. N. S. 471 ; *Rice v. Andrews*, 32 Vt. 691.

² See *Hodgson v. Davies*, 2 Camp. 530.

³ *Rugg v. Weir*, 16 C. B. N. S. 471 ; *Rice v. Andrews*, 32 Vt. 691 ; Story Sales, § 434.

⁴ See *Hutchings v. Munger*, 41 N. Y. 155.

may fitly take payment from the buyer, where the latter is not aware of special instructions given to the contrary.¹ Thus it is reasonably safe for the buyer who calls at the seller's place of business to make payment to the seller's cashier or a clerk upon the premises apparently invested with the affairs of the concern, but not to a mere porter or errand-boy, or any third person the buyer may happen to find there; and, if the transaction be a heavy one, he ought to be especially careful how he pays the cash to any one but the seller himself, or some one manifestly in the seller's confidence for handling money. A check made out to the seller's order, and handed over in adjustment of the price, might, if not objected to, clear the buyer of perplexity when dealing with doubtful third parties.² So, too, if payment be demanded at the buyer's own door, the party who delivers the goods may often be deemed the proper party to receive payment, though not necessarily, since men are chosen to deliver because of bodily capacity; and a receipted bill of parcels for the price of the goods can hardly fail of being a sufficient credential empowering him whom the seller may have sent with it to receive the money; yet any special restriction of authority which is brought to the buyer's notice before he pays must not be disregarded.³ The buyer's tender of payment after the usual manner may be made, in any event, to one who is the duly authorized agent of the seller; and, even though the agent denies his authority, the tender will be good for all legal purposes.⁴

Auctioneers, brokers, factors, and attorneys are classes of

¹ See Story Agency, §§ 60, 209, 226-228.

² *Kaye v. Brett*, 5 Ex. 269; *Barrett v. Deere*, M. & M. 200; *Benj. Sales*, bk. 4, pt. 3, c. 2. Parke, B., observed, in *Kaye v. Brett*, that if a shopman, who is authorized to receive payment over the counter only, receives money elsewhere than in the shop, the payment is not good: but this is, of course, *prima facie* only; for a shopman is frequently authorized to go outside to collect bills for his employer.

³ *Ib.*

⁴ *McIniffe v. Wheelock*, 1 Gray, 600.

agents, each with a certain understood scope of employment which the law of agency assumes to define. They are not vested in all respects with co-ordinate powers: for it is said that a factor is intrusted with the goods, and so may give discharge of payment; while a broker has no possession of the goods, and therefore may not.¹ But the course of employment of all such parties will vary according to the temporary local usage; and it is a generally received opinion, that, where an agent has by law a lien upon the property in his possession, payment to the principal will not absolve the buyer from liability to satisfy the agent's lien.² There is some conflict, in the adjudged cases, upon the question of a factor's authority to sell on credit; but, while the English rule is still a stringent one, the weight of American authority favors the assumption that he may sell on credit, unless a contrary usage is shown.³ Where a factor takes a negotiable note of the buyer, payable to his own order, for the price, he does not thereby bind himself to his principal personally for the debt, if the buyer who gave the note was in good credit;⁴ and the same is affirmed likewise of auctioneers.⁵ But neither factor nor auctioneer can sell in any mode unusual in the business, nor inconsistently with the authority plainly conferred upon him.⁶

¹ Benj. Sales, bk. 4, pt. 3, c. 2; Story Agency, § 209. And see *post* as to auction sales.

² *Ib.*; Robinson v. Rutter, 4 E. & B. 954; Catterall v. Hindle, L. R. 1 C. P. 186; L. R. 2 C. P. 368; 1 Sch. Pers. Prop. 497-500.

³ Story Agency, § 209, and *n.*; Riley v. Wheeler, 44 Vt. 189; Dwight v. Whitney, 15 Pick. 179; Daylight Burner Co. v. Odlin, 51 N. H. 56; 1 Am. Lead. Cas. 654 *et seq.*; Benj. Sales, bk. 4, pt. 3, c. 2; Catterall v. Hindle, L. R. 1 C. P. 186, *per* Keating, J.

⁴ Dwight v. Whitney, 15 Pick. 179; Kidd v. King, 5 Ala. 84; 1 Am. Lead. Cas. 662.

⁵ Townes v. Birchett, 12 Leigh, 174; Corlies v. Cummings, 6 Cow. 181.

⁶ Warner v. Martin, 11 How. 226; Benny v. Rhodes, 18 Mis. 152; 1 Am. Lead. Cas. 662; Story Agency, § 209; Williams v. Evans, L. R. 1 Q. B. 352.

We may add, that, under most circumstances, a third person empowered to receive payment on behalf of the seller is presumed to have authority to receive cash in hand only; and though an agent may doubtless be invested with full powers of settlement, so as to take the buyer's notes with or without security, to receive some commodity as an equivalent, to extend the time for payment, and even to forbear or compromise, it is only an attorney at law or some party with powers very clearly conferred, expressly or by inference of law, who can handle the seller's privileges with such freedom.¹

Where an agent has sold for an undisclosed principal, the buyer is justified in dealing with the agent as seller, and settling for the goods, subject to such offsets as may be proper against the party personally.² But the material issue here is, whether the real owner has so conducted himself as to warrant the buyer in dealing with the agent as the real owner; for, if not, the case is simply one of misappropriation by a party in possession of the chattels, and an invalid sale. Carelessness in ascertaining the true state of facts recoils upon the purchaser: if he rejects evidence which shows the sale to be that of an agent, his conduct is inexcusable; nor can he treat himself as indebted personally for the price to either principal or agent, as may best suit his convenience.³ An agent may, however, be empowered to sell for various principals; and in an English case where a broker went into insolvency, who had sold lots of goods belonging to different principals, receiving from the buyer a payment on account large enough to discharge either debt, but not enough to pay both, which he had not appropriated specifically, the court appropriated the payment between the principals *pro rata*, leaving each to sue the buyer for his unpaid balance.⁴

¹ *Ib.*

² *Ramazotti v. Bowring*, 7 C. B. n. s. 851.

³ *Ib.*; *Pratt v. Wiley*, 2 C. & P. 350; *Benj. Sales*, bk. 4, pt. 3, c. 2.

⁴ *Favenc v. Bennett*, 11 East, 36; 1 Sch. Pers. Prop. 478.

The Roman law closely resembled our own as to payment and tender. The creditor was, in general, bound to make a demand of payment at a suitable time and place, and the debtor to respond accordingly ; but wherever the sum due was fixed, and the mode and time of payment clearly ascertainable by mutual agreement or through legal construction, no demand was requisite. The judge (or *prætor*) decided what was suitable in a disputed case according to the evidence before him.¹ There was this further provision for the debtor's benefit, that, if the creditor refused to accept his rightful tender of payment, he might pay the sum over to certain public officers, and so stand acquitted of the debt ;² a mode of procedure still to be traced in the modern codes of Continental Europe, which permit the debtor in such a case to deposit at the public treasury, upon observing certain preliminary formalities by way of giving the creditor notice of his intention to make such deposit.³

A contract of sale frequently necessitates other costs and expenses in the course of its due execution, besides the simple payment of price by the buyer ; such as the commissions of agents engaged in negotiating the sale, transportation and warehouse charges, and customs-duties. The contract may, expressly or by implication, manifest the mutual intent in such matters ; though presumably one pays the charges of his own negotiating agents, while the expenses strictly incidental to transferring custody from the seller after a bargain is consummated are to be borne by the buyer.⁴ But, for special expenses which the seller may have incurred

¹ Dig. 40, 5, 26, § 1 ; Benj. Sales, bk. 4, pt. 3, c. 2.

² Cod. 4, 32, de Usuris, 19 ; Benj. Sales, bk. 4, pt. 3, c. 2.

³ Benj. ib. ; Code Civ. art. 1257 *et seq.*

⁴ See *Rugg v. Minett*, 11 East, 210 ; *Welch v. Moffat*, 1 Thomp. & C. (N. Y. Supr.) 575.

in putting the property into a deliverable condition, the buyer is not legally answerable in the absence of an express agreement to that effect, inasmuch as such items may well be supposed to have entered into the price consideration; and accordingly, where wool lying on the seller's premises was sold, payable on delivery by weight, the seller was not allowed to reimburse himself for the cost of labor in putting the wool into sacks furnished by the purchaser, the understanding of the parties being that the wool was not to be weighed until after it was put into the sacks.¹ Usage is sometimes available, where the contract is silent, as to the party who should pay miscellaneous expenses.²

¹ *Cole v. Kew*, 20 Vt. 21.

² *Howe v. Hardy*, 106 Mass. 329.

CHAPTER IX.

STATUTE OF FRAUDS; CONTRACTS OF SALE EMBRACED.

HITHERTO we have dealt with sales of personal property as a branch of common-law jurisprudence, regardless of modern legislation; but, now that the reader has been carried through the successive stages of formation and full performance of the contract, we may next examine in detail the important changes in the mode of performance which have followed in the wake of the Statute of Frauds, the most famous act of legislation which affects our law of sales. The investigation will occupy this and the two succeeding chapters.

The act 29 Car. II., c. 3, is the original Statute of Frauds, which takes its name from the object of its enactment as avowed in its preamble,—to wit, “for the prevention of frauds and perjuries;” the general policy of its framers being to throw about the most momentous transactions of life the safeguards of written proof, instead of permitting them, as formerly, to be evidenced by naked words and acts, whose feeble import invited dispute, and led to inevitable uncertainty. This act, which has well stood the test of two centuries in England with but little variation, is the accepted ground-work of local legislation in almost every State of the American Union. Of the circumstances attending its passage in Parliament little is known with certainty. The honor of originating so wise a measure has been claimed on behalf of Sir Matthew Hale (who died before the bill was introduced, but left some loose notes behind him which gave color to the claim set up by his friends) and Lord-Keeper Guilford. But

Eldon has brought to light, in later times, an opinion of Lord Nottingham, rendered June 13, 1678, less than two years after the passage of this act, in which he claimed the chief glory of its enactment for himself; though admitting that the bill received some additions and improvements from the judges and civilians after he had first introduced it into the House of Lords.¹ But, whoever first put into shape a measure which jurists must have worked upon and public sentiment breathed into long before Parliament sanctioned its passage, Lord Nottingham's declaration, that every line was worth a subsidy, shows that he appreciated in advance the workings of what was later commended from the abundant experience of the English courts as "one of the wisest laws in our statute-book."²

The only section of the Statute of Frauds which bears directly upon sales of personal property is the 17th, which runs in the original act as follows: "No contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."³ The phraseology of this section has since suffered change, and all important modifications will be noticed in their proper place hereafter.

¹ Benj. Sales, bk. 1, pt. 2, c. 1; Story Sales, § 256; 2 Swans. 83, n.; Ash v. Abdy, 3 Swans. 664, appx.; Wain v. Warlters, 5 East, 17; Wyndham v. Chetwynd, 1 Burr. 418; Bouv. Dict. "Frauds, Statute of."

² Lord Ellenborough, cited in Story Sales, § 256; Wain v. Warlters, 5 East, 17; Benj. Sales, bk. 1, pt. 2, c. 1, n., citing 1 North's Life of Lord-Keeper Guilford, 108.

³ Act 29 Car. II., c. 3, § 17. This section, as expressed, was to take effect from and after June 24, 1677. See also "Lord Tenterden's Act," 9 Geo. IV., c. 14, § 7, cited *post*, p. 455.

So, too, the legislatures of most American States, in re-enacting its provisions, have made alterations, by no means uniform, to better adapt the law, in their judgment, to the wants of a later age and a newer country.¹ But, in the main, the spirit of the above enactment is retained, which, it is observable, applies the requisition of written proof with these two leading limitations: *first*, that the subject-matter of sale shall be beyond designated value; *second*, that other oral formalities, plainly evincing a sale, shall not have been pursued.

Our first observations upon the policy of this section, then, are, that the ordinary law of sales is still allowed free play in transfers of small value, though the practical limit of value at this day, when we have so many kinds of incorporeal chattels, is not uniform; and that the written requirement of the statute need not be complied with, provided certain oral formalities are fully pursued by the parties. In other words, the transfer of personal property is only partially and *sub modo* hampered by the Statute of Frauds, so far as concerns the necessity of writing in a contract of sale.

But now comes a more difficult inquiry, and one which the courts have not yet fully disposed of; namely, What are the legal consequences which ensue from non-compliance with the terms of this section, in cases to which it applies? It is often said that the statute effects its declared purpose of preventing fraud and perjury by putting an end to contracts

¹ See Browne's Stat. Frauds, 3d ed. appx., for American legislation on this section in detail. Many of these statutes, as in Connecticut, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, and Vermont, copy the English model closely, though with verbal differences, and fixing the price at various amounts. But in New York the statute is thrown into a new shape; and California, Iowa, and Wisconsin pursue substantially the same form. Delaware, Illinois, Kentucky, Ohio, Pennsylvania, Rhode Island, Tennessee, and Virginia do not appear to have legislated directly on this subject. Some of the peculiar changes of legislation will appear in detail hereafter.

which do not conform to its requirements ; and so accurate a thinker as Mr. Smith has observed that "a parol contract, unaided by any of the formalities mentioned in the 17th section as equivalent to writing, is totally and entirely void."¹ But opposed to this view of the situation is eminent authority. Says Mr. Browne of the 17th section, in his treatise on the Statute of Frauds : "That enactment does not declare that the contracts embraced by it are illegal or void, unless put in writing. It does not in any way affect their substance or ingredients, but simply prescribes, as a rule of evidence, that, in cases where they are sought to be enforced, oral proof of them shall not be received."² There are late decisions in Massachusetts and Vermont, which, upon precisely this ground, permit the party sued to so waive his immunity under the statute as to stand bound by the contract.³

When we turn to the statute itself, and read it over, we find that the original section 17 declares that "no contract" for the sale, &c., "shall be allowed to be good," except in the cases meant, — an equivocal expression, truly ;⁴ and upon these words are based not only the English adjudications, but those of many American States : whereas the expression of the New York enactment, which certain other State legislatures have copied, is, that every contract of sale shall be "void" unless the specified requirements are met.⁵ "The

¹ Smith Contracts, 117. And see Channell, B., in *M'Lean v. Nicoll*, 7 Jur. n. s. 999; Bigelow, J., in *Marsh v. Hyde*, 3 Gray, 331.

² Browne Stat. Frauds, § 115 and *n.*

³ *Montgomery v. Edwards*, 46 Vt. 151; *Middlesex Co. v. Osgood*, 4 Gray, 447. And see *Townsend v. Hargraves*, a still later Massachusetts decision, 10 Am. Law Rev. 375 (Jan. 1876).

⁴ Act 29 Car. II., c. 3, § 17; *supra*, p. 444.

⁵ See Browne Stat. Frauds, 3d ed. appx. And yet it is said, in *Hawley v. Keeler*, 53 N. Y. 114, that the Statute of Frauds does not condemn verbal contracts for the sale of goods. In *Brown v. Allen*, 35 Iowa, 306, the court lays stress on the circumstance that the Iowa statute does not (like some others) declare that sale void which fails to comply with requirements.

expression 'allowed to be good,'” says Bramwell, B., in *Noble v. Ward*, “is not a very happy one; but whatever its meaning may be, it includes this, at least, that it shall not be held valid or enforced.”¹ Much of the difficulty, then, seems to arise upon the ambiguity of the legislative expression; which fact being taken for granted, it becomes a legitimate inquiry how far the language of other sections in the original statute (applicable to conveyances, devises and bequests by will, collateral undertakings, and the like) might be invoked in furtherance of the construction of section 17. But, while one English act covers the whole ground, in most of the United States the substance of the various sections has been, in fact, embodied in several entirely separate acts of legislation.² In no event should a local construction be given to such a provision without reference to the important changes wrought by the local legislation in the phraseology of this section.

There might be objections to the view that the Statute of Frauds operates, in its 17th section, merely to exclude oral proof of the contract, in a case of non-compliance: for this seems to narrow down too much the natural import of legislative language; and it might lead, besides, to mischievous consequences (particularly as concerns third persons), to treat the property as passing upon an oral contract which the original parties might afterwards evince by their writing or not, at their election.³ But far more objectionable is Mr. Smith's view, with which, indeed, the English decisions are plainly inconsistent; for to regard the contract as void where statute formalities fail of observance is to place the broadest possible

¹ *Noble v. Ward*, L. R. 1 Ex. 117. “Shall be good or valid” is the statutory expression used in Massachusetts and some other States. See Browne, *ib.* appx.

² See Browne, §§ 115, n., 365.

³ See 9 Am. Law Rev. 434, 456, where some of the objections are stated at length to Mr. Browne's view.

interpretation upon the language of the original act, and make the legislature's rebuke of oral sales exceedingly harsh. That no such disastrous consequences fairly ensue will better appear when we examine what sort of writing satisfies the statute.¹ But there either is or is not a contract of sale existing in legal contemplation when the common-law requirements are fulfilled, notwithstanding the statute fails of compliance; and the most rational course appears, on the whole, to be, to accept the fact of its existence, and then to regard a non-compliance with the statute formalities as rendering the contract simply unenforceable for the time being. This midway doctrine vindicates the policy of the act, puts a reasonable construction upon the language of the 17th section, and better harmonizes the decisions than any other yet adduced; though none, perhaps, can do so absolutely. To quote Mr. Justice Williams: "The effect of that enactment is, that, although there is a contract which is a good and valid contract, no action can be maintained upon it, if made by word of mouth only, unless something else has happened; *e. g.*, unless there be a note or memorandum in writing of the bargain, signed by the party to be charged. As soon as such a memorandum comes into existence, the contract becomes an actionable contract."² And Channell, B., has said: "The more correct view is, that the contract still exists, but that it cannot be put in force."³

We may notice, in passing, that a sale contract, so far from requiring some contemporaneous writing to give it force, may be made good and enforceable by acts afterwards done by the defendant in compliance with the statute; and the better opinion is that the contract thereupon takes effect, *quoad hoc*, by relation back to the date of the oral agreement.

¹ *Infra*, c. 11.

² *Bailey v. Sweeting*, 9 C. B. N. S. 843, 859.

³ *Channell, B.*, in *M'Lean v. Nicoll*, 7 Jur. N. S. 999.

Thus, in *Bailey v. Sweeting*, the defendant verbally bought glasses to be paid for on delivery by the carrier. The glasses were damaged in transit; and the defendant refused, at first, to take them, but afterwards made such a writing as amounted to a satisfaction of the statute. The decision was, that the defendant had become liable to pay the full price for the goods sold; and this upon the familiar principle, doubtless, that, the bargain for specific goods being completed, the risks of safe transit are presumed to fall upon the buyer.¹ This squares with the theory that a contract of sale exists, but may be unenforceable for non-compliance. There is, however, a rule set out in *Bill v. Bament*, to the effect that compliance with the statute, after action brought, cannot render the contract sued upon enforceable; but this case is an anomalous one, and may, perhaps, be explained by the rules of practice.² A still later English decision of the Queen's Bench may be cited, where a memorandum in writing, made by the defendant after the goods had been delivered to a carrier, and had been totally lost at sea while in his hands, was held sufficient to take the case out of the statute.³

But an interesting point not noticed in this last case — whether the statute compliance comes too late after the goods have ceased to exist — was afterwards raised in Massachusetts upon a state of facts quite similar, and decided in conformity with our proposition.⁴ An action was brought for the price of thirty-seven bales of wool sold by oral contract while the wool was in the hands of a warehouseman. Nineteen of these bales were afterwards entirely destroyed by fire while in the warehouse. The remaining eighteen had been

¹ *Bailey v. Sweeting*, 9 C. B. N. s. 843. And see *Vincent v. Germond*, 11 Johns. 283; *Seymour v. Davis*, 2 Sandf. 239.

² *Bill v. Bament*, 9 M. & W. 36; *Tisdale v. Harris*, 20 Pick. 9. But see *Gibson v. Holland*, L. R. 1 C. P. 1, *per Willes*, J.

³ *Leather Cloth Co. v. Hieronimus*, 32 L. T. R. N. s. 307.

⁴ *Townsend v. Hargraves*, 10 Am. Law Rev. 375.

sent to the buyer, who accepted them, though, as the testimony appeared to establish, not until after the destruction of the other bales. The question was raised, whether a part acceptance of goods, such as the statute permits as one form of compliance with its terms, can take place so as to render the contract valid and enforceable. Now, had this contract been *void* until the statute was complied with, there could have been nothing for a court to enforce; for the sale would have been thus attempted of property not in actual existence, which, we have shown, fails for want of a subject-matter.¹ But treating the section as one which renders a contract simply unenforceable while non-compliance continues, which affects the remedies but does not deny that there is a contract, the court found that the statute compliance came not too late, though the unaccepted portion of the goods had been meanwhile destroyed; for, if there had been a completed contract according to common-law rules, the property, as we have also shown, vested in the purchaser, and a right to the price in the seller as soon as the contract was made, subject to the seller's lien, and right of stoppage *in transitu*.² It is worthy of mention, that this court declared its opinion that the Statute of Frauds "only affects the mode of proof as to all contracts within it;" but the context shows that the judgment rested fairly enough on the modern English view, which has seemed to us preferable in expression, that the statute admits an existing contract as to the parties which it refuses to enforce until compliance is made with its provisions.³ The statute, on either hypothesis, is thus established to affect the remedy of the contract, and not its validity.

On the ground that the remedy and not the validity of the contract is affected by this 17th section of 29 Car. II., it has been held that an oral contract, good by the law of the

¹ See *supra*, c. 1.

² See *supra*, c. 2.

³ *Townsend v. Hargraves*, 10 Am. Law Rev. 375. But see *Vincent v. Germond*, 11 Johns. 283.

place where made, will not be enforced in the courts of Great Britain.¹

Since a contract which fails to comply with the Statute of Frauds is such an undertaking that the seller cannot sue for his price, neither can a promissory note given by him in consideration of damages claimed by the buyer for non-delivery of the goods be enforced, so far as these original parties to the contract are concerned.²

The relation of the Statute of Frauds, section 17, to contracts of sale, will now be considered under these three leading divisions: I. The contracts embraced under the statute; II. Oral acts of compliance with the statute; III. Written compliance with the statute. To the first division we shall devote the remainder of this chapter, the other divisions receiving treatment in the two chapters next succeeding; and the convenient method will be pursued throughout of basing our running commentary upon the English statute, which, the reader will perceive, first sets forth the contracts upon which the statute operates, and then announces three modes of satisfying its requirements: (1) by acceptance and receipt; (2) by giving earnest or part payment; both of which are oral; and (3) by making a written note or memorandum.

I. As to the contracts embraced under the statute. The language of the original statute suggests three leading inquiries, to be taken up in order: (1st) what are "contracts for the sale of," &c.? (2d) what classes of personal property are comprehended under the denomination of "goods, wares, and merchandises"? (3d) what standard of "price" or "value" brings a case within the statute? Of these inquiries in their order.

¹ *Leroux v. Brown*, 12 C. B. 801. See 1 Sch. Pers. Prop. 385.

² *Hooker v. Knab*, 26 Wis. 511.

(1st.) What are "contracts for the sale of," &c.? In earlier times, when the policy of this statute was seriously questioned, and courts inclined to restrain its practical operation, the point was made that "executory contracts" for the sale of goods, &c., did not come within its legislative provision. The English decisions prove somewhat contradictory in this respect, and the line zigzags as this or that policy gives it direction. *Towers v. Osborne*, decided in 1724, leads off; a case where the defendant "bespoke a chariot," and the contract was considered to be without the spirit of the enactment.¹ Lord Mansfield, in 1767, commended this decision, referring to the rule therein laid down by Chief Justice Pratt, that the Statute of Frauds relates only to contracts for the actual sale of goods "where the buyer is immediately answerable without time given him by special agreement, and the seller is to deliver the goods immediately." And in the present case — *Clayton v. Andrews* — the court held that the statute could have no application to a contract for the sale of wheat at so much a load, to be delivered about one month later, payable on delivery; the wheat being as yet unthrashed.² *Groves v. Buck* was decided in 1814 on a similar principle; Lord Ellenborough declaring that a parol agreement to purchase oak-pins which were not yet cut out of the slabs did not come within the statute, since the subject-matter was incapable of present delivery.³ But it is observable, that, in all three of these cases, the contract was of something more than a merely "executory" character; and this idea Lord Ellenborough put forward more clearly than his predecessors had done. The thing was actually incapable of a present delivery and acceptance: it was not a chariot, or a heap of corn, or a lot of oak-pins already in existence, whose delivery happened

¹ *Towers v. Osborne*, 1 Strange, 506.

² *Clayton v. Andrews*, 4 Burr. 2101. And see *Alexander v. Comber*, 1 H. Bl. 20.

³ *Groves v. Buck*, 3 M. & S. 178.

to be postponed by mutual consent to a future day, but a chattel not existing at all when the contract was made, — a chariot to be built, corn to be thrashed, oak-pins to be cut out.

On the other hand are early cases which claim shelter of the statute, without being in principle clearly distinguished from the foregoing decisions. Thus *Rondeau v. Wyatt*, which was decided in 1792, enforced the statute provision upon a state of facts showing that the defendant, a mill proprietor, had verbally agreed to sell and deliver three thousand sacks of flour to the plaintiff; the flour to be put into sacks which the latter was to furnish, and then shipped by such vessels as he should send. The contract was held to be unenforceable against the mill proprietor. Lord Loughborough, who rendered judgment in this case, would not admit, as the plaintiff's counsel requested, that this was an "executory contract." It was singular, he said, that an idea could prevail that this statute applied only where the bargain was immediate: indeed, the statute provision would not be of much use unless it were to extend to executory contracts; for it is from bargains to be completed at a future period that the uncertainty and confusion will probably arise which the statute was designed to prevent. This being a contract for specific existing flour, Lord Loughborough decided rightly: but, in the apparent effort to avoid collision with Lord Mansfield, he distinguished the former cases of the chariot and unthrashed corn from the present on a slim suggestion, — that the one was for work and labor to be done, and materials and other necessary things to be found; and the other required *some work* to be done; namely, thrashing, — though "this, perhaps," he was forced to add, "may seem to be a nice distinction."¹ In *Cooper v. Elston*, decided only four years later, Lord Kenyon took occasion to express his satisfaction that Lord Lough-

¹ *Rondeau v. Wyatt*, 2 H. Bl. 63.

borough's very able decision had brought the construction of this clause of the Statute of Frauds back to the manifest intention of the legislature. Here it was decided that the case of wheat sold by sample, to be delivered at a later date, came within the requirements of the statute; and Lord Mansfield's doctrine was thrown still farther into the background. The remarks of Grose, J., as to "executory contracts" in this same case are quite pertinent, and might be thrown into this form: "If you mean contracts for sale to be executed at a future day, you repeal the statute; but if only such contracts as are incapable of being executed at that time, then you are right."¹ But *Garbutt v. Watson*, decided in 1822, and very briefly reported, goes a step farther; for here was brought within the statute provision an agreement relating to one hundred sacks of flour not at the time "prepared" (as the reporter says) "so as to be capable of being immediately delivered to the defendant." But while the contract related to that which then existed in the shape, not of flour, but of unground wheat, the opinion of Abbott, C. J., intimates that the bargain was not for so much flour to be manufactured from such materials as the seller might supply, but for a specific lot of unground wheat which required to be ground up into flour; in other words, for an identified quantity of unground wheat estimated as equivalent to so much flour; an important circumstance, if true, which the later cases have not noted.² The court in this case, otherwise so strongly resembling *Clayton v. Andrews*, showed a clear disposition to repudiate Lord Mansfield's celebrated decision altogether; and the Chief Justice pronounces even *Towers v. Osborne* an extreme case. The

¹ *Cooper v. Elston*, 7 T. R. 14 (A.D. 1796).

² *Garbutt v. Watson*, 5 B. & Ald. 613. Says Abbott, C. J.: "In *Towers v. Osborne*, the chariot which was ordered to be made would never but for that order have had any existence. But here the plaintiffs were proceeding to grind the flour for the purposes of general sale, and sold this quantity to the defendant as part of their general stock."

opinions as reported are all quite brief; Bayley, J., announcing distinctly what the other judges probably accepted as the true test,—that the question is, whether this was a contract for the sale of goods, or for work and labor and materials found. That it was for the sale of goods they all agreed.¹

Whatever the lurking doubts of English lawyers as to the true footing of “executory contracts” under the statute, in the sense of “contracts for a future delivery,” they were dispersed by the act of 9 Geo. IV., c. 14, § 7, known as Lord Tenterden’s Act, which plainly declares such contracts within the mischief intended to be remedied by the 17th section. This enactment, which followed close upon *Garbutt v. Watson*, is decisive of the controversy for Great Britain; for it provides that the 17th section of the Statute of Frauds shall extend “to all contracts for the sale of goods of the *value* of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery; or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.”² This statute is now a part of the English Statute of Frauds, and the later cases in that country comment upon Lord Tenterden’s Act and the old 17th section as the joint exposition of the Parliament’s policy.³

But, notwithstanding Lord Tenterden’s Act, the discussion soon broke out anew, as to what should be pronounced contracts of sale whose non-compliance with the statute must necessarily interfere with their enforcement; for the old cases had left their trail. *Clay v. Yates*, decided in 1856, raised the point; the plaintiff in this case, a printer, having verbally

¹ *Garbutt v. Watson*, 5 B. & Ald. 613.

² See Browne Stat. Frauds, 3d ed. appx.

³ *Scott v. Eastern Counties R. R. Co.*, 12 M. & W. 33; *Haman v. Reeves*, 18 C. B. 587.

contracted with the defendant to print the second edition of a work, finding his own paper and materials, and a quarrel arising between them, when the book was nearly ready, because the printer refused to print what he thought a libellous dedication: whereupon the defendant refused to pay him for any of the printing. The Statute of Frauds was pleaded. It was held that this was not a contract for the sale of a thing to be delivered at a future time, nor a contract for making a thing to be sold when completed, but a contract to do work and labor, furnishing certain materials; and that the case was not governed by Lord Tenterden's Act, nor within the Statute of Frauds.¹ There was manifest justice in deciding this case so as to compel the defendant to pay for what was printed before the quarrel arose; and, as a precedent, the decision has not been questioned. But in the several opinions pronounced in this case were some passages which called for criticism in *Lee v. Griffin*, which, following in 1861, is the latest reported English case on the subject. A dentist brought a suit against the executor of a lady's estate for making to the lady's order two sets of artificial teeth. One defence set up was the Statute of Frauds. It was decided that the dentist could not recover.² The opinions here rendered clash somewhat with those of *Clay v. Yates*, — a case which, however, was admitted to have presented a state of facts *sui generis*, entitling the plaintiff to recover; and the doctrine that the statute does not apply where work is the essence of the contract, rather than materials furnished, is here discarded. But the truth is, the facts in the present case were likewise peculiar; for the lady who ordered the artificial teeth did so on the understanding that they were to be fitted to her mouth: she died before they were fitted, and hence the contract failed of fulfilment, and this through no fault of hers.³

¹ *Clay v. Yates*, 1 Hurl. & N. 73.

² *Lee v. Griffin*, 1 B. & S. 272.

³ See opinion of Hill, J., in *Lee v. Griffin*, *supra*, which lays stress upon these facts.

The printer in the former case, not owning the copyright in the defendant's book, would have had nothing valuable left in his hands if cut off by the Statute of Frauds from pursuing his remedies ; but even in the latter case, admitting that the statute found the plaintiff much better off, two sets of artificial teeth, made to fit a particular mouth, it must be allowed, are not a sort of commodity to be easily passed off at a current price to the next customer.

The chief value of *Lee v. Griffin* appears to be in the opportunity which it afforded members of the court, and Judge Blackburn particularly, of bringing a distinctive test to bear upon contracts of sale under the 17th section. We have seen that it discards a theory which Pollock, C. B., is thought to have favored in *Clay v. Yates*, — that the value of the skill and labor, as compared with that of the material supplied, is a just criterion ; that case, however, showing that the most important material, namely, book manuscript, was supplied, not by the workman, but by the party for whom the work was to be done.¹ The test for which *Lee v. Griffin* pronounces is this : If the contract be to deliver a thing, which, when completed, would have resulted in the sale of a chattel for a price, the Statute of Frauds operates upon it. To use

¹ It is by no means clear that Pollock, C. B., in *Clay v. Yates*, *supra*, meant to set up any such general test as that which Crompton, J., assumes for the purpose of refuting in *Lee v. Griffin*. This is the language of Pollock, C. B.: "It may happen that part of the materials is found by the person for whom the work is done, and part by the person who does the work ; for instance, the paper for printing may be found by the one party, while the ink is found by the printer. *In such cases*, it seems to me that the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied." Nor, even supposing him to have referred to the supply of work and all the materials by the workman, was this claimed to be a test beyond deciding whether the contract could be sued upon for work, labor, and materials, as well as for goods sold and delivered. All of the propositions in *Clay v. Yates* are put forward in a tentative style, and as though for the purpose of meeting the peculiar facts of the case. But cf. Benj. Sales, 1st ed., bk. 1, pt. 2, c. 1, p. 79.

Judge Blackburn's own words: "The question is, whether the contract was one for the sale of goods or for work and labor. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered."¹

This latest exposition of English law on the subject (which borrows support from an earlier decision of Tindal, C. J.²) appears to bring the influence of the 17th section to bear upon all cases where the substance of the contract was goods to be sold and delivered, stopping short at cases which are essentially for work and labor done and materials furnished; "and the reason," as Pollock, C. B., has observed, "why no cases on this subject are found in the books is, that, before Lord Tenterden's Act passed the Statute of Frauds did not apply to the case of goods not actually made, or fit for delivery."³

Turning to the American decisions on the subject, we find various tests put forward by the courts of the several States, but nothing which can be claimed as authoritatively settling the application of the statute. We are confronted at the outset by numerous legislative enactments not in perfect accord, nor supplemented by such explanatory acts as that of Lord Tenterden. The earlier decisions of New York and some other States refused to apply the statute provision to

¹ Blackburn, J., in *Lee v. Griffin*, 1 B. & S. 272.

² *Ib.*; Tindal, C. J., in *Grafton v. Armitage*, 2 C. B. 336, distinguishing *Atkinson v. Bell*, 8 B. & C. 277.

³ *Clay v. Yates*, 1 H. & N. 15.

sales of cut nails not yet manufactured, unthrashed wheat, and other cases of commodities not yet existing *in specie*; thus recognizing Lord Mansfield's rule in the sense understood by Lord Loughborough: but the better opinion is against extending that principle beyond the case of articles sold which in a measure require preparation for delivery by one's work and labor.¹ *Garbutt v. Watson*, and Chief Justice Abbott too, are cited against Lord Mansfield in some of our later cases; and we may, at all events, assume that the old exemption from the statute, of contracts to deliver hereafter a commodity already in existence, has no present footing in the United States.² It appears to be the New York doctrine (though it rests upon early precedents) that an agreement for the sale and delivery, now or hereafter, of articles already existing, is within the statute, but not an agreement to sell and deliver articles which have no existence, and are to be made hereafter.³ Mr. Story inclines to follow the English rule announced in *Clay v. Yates*, without noticing the later qualifications which *Lee v. Griffin* introduced.⁴ Some of our latest State decisions adopt Judge Blackburn's test in substance.⁵

¹ *Sewall v. Fitch*, 8 Cow. 215; 2 Kent Com. 511; Story Sales, § 260; *Crookshank v. Burrell*, 18 Johns. 58; *Eichelberger v. M'Cauley*, 5 Harr. & J. 213; *Mattison v. Westcott*, 13 Vt. 261; *Allen v. Jarvis*, 20 Conn. 38; *Browne Stat. Frauds*, § 306. And see *Rentch v. Long*, 27 Md. 188; *Downs v. Skillinger*, 23 Wend. 270; *Hight v. Ripley*, 19 Me. 137.

² See *Browne Stat. Frauds*, § 305; *Cason v. Cheely*, 6 Geo. 554; *Hooker v. Knab*, 26 Wis. 511.

³ See *Crookshank v. Burrell*, 18 Johns. 58; *Bellows, J., in Pitkin v. Noyes*, 48 N. H. 299.

⁴ Story Sales, § 260; and see this statement corrected in *Bennett's n.*, 4th ed.

⁵ See *Pitkin v. Noyes*, 48 N. H. 294; *Prescott v. Locke*, 51 N. H. 94. In this last case, the legislative prohibition was allowed full play: for the contract to purchase such walnut spokes, at a certain *pro rata* price, as the plaintiff should saw at his mill and deliver, was held to be a contract of sale within the statute, and not one for work and labor; though it was observed that the agreement did not contemplate the peculiar skill, care, or labor of the maker.

And, upon the whole, the American courts appear to have groped steadily along by the light of the English precedents; some halting by the way, others passing on.

But, in Massachusetts, a peculiar construction has been given to the Statute of Frauds, and to this effect: "That a contract for the sale of articles already existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute."¹ This rule was first promulgated in *Mixer v. Howarth*, and has been followed since in a series of decisions, of which the latest is the very recent one of *Goddard v. Binney*, where the conflicting doctrines of the whole subject are clearly and succinctly stated.² It is curious that both the first and the last of these cases should be found quite similar to the ancient English one of the chariot, which has so frequently proved a stumbling-block, but which here finds favor. In *Goddard v. Binney*, the plaintiff had agreed to build a buggy for the defendant, according to his directions: he did so, marking the carriage with the defendant's initials, as requested. The buggy was destroyed by fire when finished, and after the defendant had pronounced it satisfactory. The plaintiff sued for his price, and the defendant set up the Statute of Frauds. It was held that the statute did not meet the case. The court did not deny that this Massachu-

¹ Ames, J., in *Goddard v. Binney*, 115 Mass. 430. But an oral contract for plank is within the statute, notwithstanding a stipulation that the seller shall saw the logs into plank under the buyer's direction. *Clark v. Nichols*, 107 Mass. 547.

² *Mixer v. Howarth*, 21 Pick. 205; *Lamb v. Crafts*, 12 Met. 353; *Gardner v. Joy*, 9 Met. 177; *Waterman v. Meigs*, 4 Cush. 497; *Clark v. Nichols*, 107 Mass. 547; *Goddard v. Binney*, 115 Mass. 450.

setts doctrine differed from that of New York, on the one hand, and the English, as set forth by Judge Blackburn, on the other. Some of the late Maine cases appear to indicate a judicial leaning in the same direction.¹

To sum up the results. There is no principle yet found which can quite reconcile the decisions; and this naturally enough, since an act which the earlier courts disrelished, and sought to hedge in by construction, has, in time, been admitted to justify the wisdom of its framers. Putting ourselves where the legislators of this celebrated section stood, we should say that the words "no contract for the sale of" would bear either of these two interpretations, — (1st.) That where the chattel contracted for does not yet exist *in specie*, but requires to be manufactured and brought into being under the contract, there is no contract of sale within the statute; this being consistent with the idea, that there is no sale, properly speaking, whatever agreement might be entered into, until the parties are *ad idem* upon an existing subject-matter. This is the narrow construction, suitable to a policy of disfavor; one which justifies most of the earlier English cases, — possibly even *Garbutt v. Watson* itself, — and, though now repudiated in England, with a strong footing, seemingly, in New York. (2d.) That whatever contract, whether as to chattels existing or chattels non-existing, may have been entered into, which in substance is for goods to be sold and delivered, and not work, labor, and materials only, — that is to say, which, when

¹ See *Hight v. Ripley*, 19 Me. 139; *Edwards v. Grand Trunk R. R. Co.*, 48 Me. 379. In the latter case, all the wood that the plaintiff would make for a season was contracted for, and this was held to come within the statute; but, in the former, a contract to make implements after a certain pattern was pronounced without the statute. This is the rule by which the cases are reconciled, as stated in *Edwards v. Grand Trunk R. R. Co.*: "The fact that the article contracted for does not exist at the time of the contract, but is to be made or manufactured, will not necessarily take the case out of the statute. It must also appear that the particular person who is to manufacture it, or the mode and manner, or materials, enter into and make part of the contract."

properly carried out, will result in the sale of a subject-matter for a price, — comes within the statute as a contract of sale. This, too, the latest English exposition of the doctrine, which is plainly based upon the policy of giving the widest possible operation to the enactment, justifies the language of the written law. But this latter construction, for which a writer of our day strongly contends, expressing his surprise that “a rule so satisfactory and apparently so obvious” should not have been suggested earlier,¹ antagonizes the decisions of such eminent jurists as Mansfield, Loughborough, and Ellenborough, and looks to the future for vindication, and is, at the same time, open to the objection that a statute which suffers many to escape the obligation of honest performance, because of informalities, practically promotes the fraud which it theoretically seeks to prevent. Midway between these extremes stands the Massachusetts rule; which, on the score of policy, is preferable to either of the others. (3d.) That the statute applies to contracts for the sale of articles already existing, or such as the seller ordinarily makes or procures for the general market, but not to a contract for an article to be manufactured especially for the purchaser and upon his special order. This statement has the happy faculty of hitting between wind and water; and on the whole, while admitting discrepancies, the rule brings more of the earlier and later cases into good fellowship than any other yet put forward: but the objection is, that it distorts the legislative expression, and gives to the words “contracts for the sale of” goods, &c., a meaning which the statute framers could never have remotely intended. As between these three rules, which (though each has its own merits) are not to be reconciled with one another, the courts are put to their election, until legislation shall assert itself in the premises more positively; for better guiding principles of construction are

¹ See Benj. Sales, bk. 1, pt. 2, c. 1.

hardly to be looked for while the 17th section stands unaltered.¹

Auction sales, it is now settled, are within the policy of the Statute of Frauds; though this was in Lord Mansfield's time, and up to the present century, made a matter of doubt. Not only sales by common auctioneers are thus covered; but sheriff's sales on execution, and public sales generally, to the same extent as private sales.² The phraseology of the old 17th section justifies this interpretation; while, in some of the corresponding American statutes, auctioneers' sales are expressly referred to.³

Whether a mortgage of goods, wares, &c., is within the statute, is a matter of doubt; for loans, whether secured by lien, pledge, or mortgage, or unsecured, are distinct from sales. But some are of opinion that a mortgage would come within the denomination of contracts of sale, as being a sort of conditional or defeasible sale.⁴ The legal status of chattel mortgages is by no means firm, as we have elsewhere seen; their growth is comparatively modern; and a sale which is accompanied by a proviso for repurchase, or which keeps the title vested in the seller pending payment, is no mortgage at all, though much resembling it.⁵ An agreement between two parties to be partners in a sale of goods is a partnership agreement, and not within the statute.⁶ Nor is a verbal con-

¹ See Browne Stat. Frauds, §§ 299-308, *passim*, on this subject.

² 2 Kent Com. 540; Browne Stat. Frauds, § 293; Story Sales, § 264; *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, 2 B. & C. 945; *Morton v. Dean*, 13 Met. 385; *Brent v. Green*, 6 Leigh, 16; *O'Donnell v. Leeman*, 43 Me. 158; *infra*, as to auctions. See Lord Mansfield, in *Simon v. Motivos*, 1 W. Bl. 599.

³ See, *e.g.*, New York, Michigan, and California statutes; Browne Stat. Frauds, appx.

⁴ Browne Stat. Frauds, § 294; *Gleason v. Drew*, 9 Greenl. 79; *Clark v. Duffey*, 24 Ind. 271.

⁵ See 1 Sch. Pers. Prop. 530, 535, *et seq.*; *Williams v. Burgess*, 10 A. & E. 499; *Watts v. Friend*, 10 B. & C. 446.

⁶ *Buckner v. Ries*, 34 Mis. 357.

tract for A. to advance money from time to time to enable B. to purchase an article, though it be further agreed that A. shall have a lien on the article as his security; for this agreement involves a loan upon security, and not a sale.¹ But where one says, "If you will do" such a thing "to the article, I will give you" so much "for it," and the owner replies, "I will do it," this imports a contract of sale, which, to be enforced, must comply with the statute.² And, notwithstanding stipulations on either side which go to make the sale a complex one, the statute applies (with the reservations already noticed) so long as the contract is one of sale; that which is really embarrassing being to determine how far the special stipulations themselves call for an exact compliance, in addition to the simple bargain upon which they are ingrafted.³

The entirety of a contract — a principle which constantly confronts us in the law of sales — is an element not to be lost sight of, when subjecting a case to the statute. A single transaction may embrace a number of items; as where a customer selects several articles, and bargains for them all at one time; and if the parties footed the account, and made some distinct agreement concerning the price, as a sum total, all the more clearly must this have been designed as an entire contract.⁴ Nor matters it that the goods were in different places, or differed in their deliverable condition, or in kind and quality, provided one contract covered them in as components of a single transaction.⁵ On the other hand, the purchase of successive lots as they are offered, with a distinct price for each, may raise the presumption of a distinct con-

¹ *Brown v. Allen*, 35 Iowa, 306.

² *Bates v. Coster*, 3 *Thomp. & C. (N. Y. Supr.)* 580; *Bowers v. Anderson*, 49 *Geo.* 143.

³ See *infra*, c. 11.

⁴ *Baldey v. Parker*, 2 *B. & C.* 37; *Mills v. Hunt*, 20 *Wend.* 431.

⁵ *Bigg v. Whisking*, 14 *C. B.* 195; *Scott v. Eastern, &c. R. R. Co.*, 12 *M. & W.* 33; *Elliott v. Thomas*, 3 *M. & W.* 170; *Story Sales*, § 464; *Gault v. Brown*, 48 *N. H.* 183. But cf. *Price v. Lea*, 1 *B. & C.* 156.

tract for each one ; and particularly is this true of an auction sale, where each lot knocked down to a bidder is almost universally presumed to be the subject of an entire contract.¹ But in private sales, where the same seller contracts with the same buyer on a single occasion, the intention to make the contract an entire one should be more readily assumed than in cases of public sale, where an auctioneer, from the nature of his business, holds himself out, when offering a number of lots at one vendue, as ready to make successive contracts, not with any individual specified, but with such successive parties, whoever they may be, as shall prove the highest bidders on the separate lots ; his course of employment, moreover, making him constantly the selling agent of several distinct owners on the same occasion.²

The question of entirety is, at all events, one of evidence, and open to proof, whether the sale be private or public. Where, on a single occasion, a bargain is struck on one article, and the parties simply discuss terms as to another, an entire sale contract can hardly arise.³ Even as to auctions, we shall find cases where the successive accepted bids of the same person for various articles put up for auction are taken together as constituting an entire contract ; the articles all belonging to one owner, and being offered at a single auction sale, upon the same terms and conditions, by way of disposing of his whole personal property on certain premises, and one bill being made out to the purchaser for the whole.⁴

If we would ascertain truly whether a given contract of sale is entire or not, we must follow the course of the parties far enough to take in their mutual intent in all its bearings. We must interpret their contract in its true spirit, and not with

¹ See *Emmerson v. Heelis*, 2 Taunt. 38 ; *Couston v. Chapman*, L. R. 2 Sc. App. 250 ; *Field v. Runk*, 2 Zab. 525 ; *Mills v. Hunt*, 20 Wend. 431.

² See auction sales, c. 18, *post*.

³ *Price v. Lea*, 1 B. & C. 156.

⁴ *Jenness v. Wendell*, 51 N. H. 63 ; *Mills v. Hunt*, *supra*.

reference to any single point of the negotiation. Did they mean a number of distinct contracts, or one indivisible contract covering several items? Time is the most decisive circumstance of all. If the purchases were made simultaneously, this goes very strongly to prove that the contract was meant to be a single entire transaction. But, on the other hand, there is no rule which absolutely declares two purchases distinct contracts, because they were not made on one and the same interview with the seller. "It has been asked," says Bayley, J., in the leading case of *Baldey v. Parker*, "what interval of time must elapse between the purchase of different articles in order to make the contract separate; and the case has been put of a purchaser leaving a shop after making one purchase, and returning after an interval of five or ten minutes and making another. If the return to the shop were soon enough to warrant a supposition that the whole was intended to be one transaction, I should hold it one entire contract within the meaning of the statute."¹ Nor is the rule invariable, that purchases on one occasion constitute an entire transaction.² From the cases may be deduced this other important consideration, that the parties might start as though there should be separate sales, and yet conclude the transaction as an entire sale.³ For it is the final review and adjustment of terms with the seller that constantly rounds the bargain, and consolidates what before were separate sale contracts into one entire transaction. We shall observe, as we proceed, that it is sometimes for the advantage and sometimes for the disadvantage of the enforcing party to have the contract of particulars construed as entire; advantageous where the issue is part performance by the buyer's acceptance and receipt, but disadvantageous whenever the standard of price or value is to be fitted to the con-

¹ *Baldey v. Parker*, 2 B. & C. 337.

² See auction cases, *supra*.

³ See Best, J., in *Baldey v. Parker*, *supra*.

tract to ascertain whether it comes within the scope of the statute; and the judicial disposition in any event to give the enforcing party the benefit of every doubt as to his right to sue on the contract may best explain, under this head, whatever tendency to confusion is found in the decisions.

(2d.) What classes of personal property are comprehended under the denomination of "goods, wares, and merchandises"? That these words are naturally confined in significance to personal property, and do not extend to real estate, is certain.¹ But when a contract of sale designates corn, potatoes, or other chattels, which as yet are ungrown, and unsevered from the soil, is it a case under the 17th section, or not? This is an inquiry which sometimes presses on comparison of the 17th with part of the 4th section of the same statute, whose purport is, that contracts for the sale of lands, or any interest in or concerning them, must be in writing; the one section applying to personal, the other to real, property.² The requirements of these two sections, it is perceived, are quite different: for the 17th always permits oral acts of performance, and eliminates contracts involving a small value or price altogether; whereas a writing is rigidly exacted, without regard to value or oral acts, wherever the 4th section takes effect.

Said Lord Ellenborough, in *Warwick v. Bruce*: "Here is a contract for the sale of potatoes at so much per acre; the potatoes are the subject-matter of sale, and whether at the time they were covered with earth in the field, or in a box, still it was a sale of a mere chattel."³ In this, as in a former decision, he and his associates appear to have relied upon the fact that the contract was confined to the sale of the potatoes, and contemplated the transfer of no further

¹ See 1 Sch. Pers. Prop. 39.

² See Bouv. Dict. "Frauds, Statute of;" 29 Car. II., c. 3, § 4.

³ *Warwick v. Bruce*, 2 M. & S. 205 (A.D. 1813).

salable interest.¹ *Evans v. Roberts* is a later case where potatoes were contracted for, which the seller was to raise at the buyer's request, and deliver at a future period; the buyer to have, meanwhile, no interest in the land, of course, amounting to a possessory right of the premises. It was held that the incidental benefit of the soil which the buyer necessarily took under his contract was no such "interest in land" within the meaning of the statute as to make the contract other than a contract for chattels.² In progressing thus far from full-grown to ungrown potatoes, the courts had somewhat shifted the line of argument; but the principal idea developed was that an interest in land under the statute, properly speaking, involves the transfer to the buyer of some exclusive right to the soil, at least temporary, so as to enable him to make his profit of the growing surface.³ Upon this distinction were carried certain cases where the purchaser of growing grass, who, under his contract, was to mow the grass and otherwise possess the soil, was held to have acquired thereby an interest in lands within the 4th section.⁴ Combined with this consideration, appeared in succeeding cases another, that of a mutual contemplation as to the state in which the article was to exist at the time of delivery;⁵ Tenterden, Abinger, and Baron Parke lending to these later decisions a weighty sanction. The policy now upheld was to refuse to bring contracts for mere industrial crops within the legislative enactment concerning "interests in land;" that is to say, to uphold the contract, though verbal, if possible, rather than suffer it to fail.

But in 1839 came *Jones v. Flint*; a case decided in the

¹ *Ib.*; *Parker v. Staniland*, 11 East, 362.

² *Evans v. Roberts*, 5 B. & C. 829.

³ See Bayley, Holroyd, and Littledale, JJ., in *Evans v. Roberts*, *supra*.

⁴ *Crosby v. Wadsworth*, 6 East, 602.

⁵ *Watts v. Friend*, 10 B. & C. 446; *Sainsbury v. Matthews*, 4 M. & W. 343.

same way, though upon a more involved state of facts than hitherto; for not only did the contract relate to crops of corn and potatoes, with a right given the buyer to come upon the land for the purpose of harvesting and carrying them away, but there was a still more questionable stipulation presented concerning lay grass, which the court got rid of by construing upon the facts that the parties had manifested no intention to sell grass which the buyer was to mow.¹ Here the court held that this right of entering upon the land to harvest and carry off the corn and potatoes did not so materially affect the case as to render the sale here, more than in other instances, one of an "interest in lands" within the statute. This was an important advance from former decisions, and so the court esteemed it; but Lord Denman's position was thus stated: "We agree that the safer grounds of decision are the legal character of the principal subject-matter of sale, and the consideration whether, in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land."² This test, and the circumstances under which it was to be applied, brought into plain view a common-law distinction to which Littledale, J., had adverted, after a somewhat discursive fashion, some thirteen years before; namely, between certain crops, the regular produce of the soil, such as grass, which the common law made part of the soil; and growing crops, *fructus industriales*, the product of annual industry, such as corn and potatoes, which, as Lord Coke said, was a personal chattel, independent of and distinct from the land.³ It is upon this latter view of the doctrine that Joy, C. B., had in 1832, in an Irish case, disposed of the whole controversy. His admirably clear and concise language is substantially as follows: The general question, whether the contract concerns an interest in lands, under the Statute of Frauds, or goods and chattels, resolves itself into another, —

¹ Jones v. Flint, 10 Ad. & Ell. 753.

² Ib.

³ See Evans v. Roberts, 5 B. & C. 829, *per* Littledale, J.

whether or not a growing crop is goods and chattels. We must leave the fine distinction of the old cases, and have recourse to a new criterion. "At common law growing crops were uniformly held to be goods; and they were subject to all the legal consequences of being goods, as seizure in execution, &c. The Statute of Frauds takes things as it finds them; and provides for lands and goods, according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided."¹ That *fructus industriales* are chattels, whose sale is not within section 4 of the Statute of Frauds, is now the settled rule of England and America.²

The first principle here noticeable is, therefore, that *fructus industriales*, or annual crops, the fruits of periodical industry, are treated under the Statute of Frauds, not as interests in land, but as chattels; and that contracts for their sale are not governed by the 4th section of the statute of Charles II. The natural inference is, that they fall within the scope of the 17th section, as "goods, wares, and merchandises:" but, though certain *dicta* take this for granted, the precise point is not settled by authority; and Blackburn, J., on the contrary, declares the proposition, that such chattels, while still growing and unsevered, are goods, wares, and merchandises, "exceedingly questionable."³ It may be well to state that annual crops, the fruits of periodical industry, are such as corn, peas, beans, tares, hemp, flax, cotton, melons, and potatoes, which yield an annual profit in return for annual labor; whilst timber, fruit-trees, grass, and clover, are *fructus naturales*, whose periodical crops are of a more permanent and

¹ Joy, C. B., in *Dunne v. Ferguson*, Hayes, 540 (Irish Ex.).

² See *Green v. Armstrong*, 1 Denio, 550; *Kingsley v. Holbrook*, 45 N. H. 313; *Story Sales*, § 263 *a*, 4th ed., Bennett's n.; *Benj. Sales*, bk. 1, pt. 2, c. 1.

³ *Blackb. Sales*, pp. 19, 20; *Benj. Sales*, bk. 1, pt. 2, c. 2; *contra*, Bayley, J., and Littledale, J., in *Evans v. Roberts*, 5 B. & C. 829; Joy, C. B., in *Dunne v. Ferguson*, Hayes, 540. And see *Blackb. Sales*, 9, 10.

spontaneous yield.¹ But certain artificial grasses which are quite frequently renewed, also hops (from a consideration paid to the special yearly culture which must be bestowed upon them, though they come from permanent roots), are now brought within the legal benefits of *fructus industriales*, and hence, as we may fairly suppose, claim exemption from the requirements of the 4th section.²

In all the foregoing cases where *fructus industriales* were held to be chattels, and not interests in lands under the Statute of Frauds, the legal purport of the decision was in furtherance of the reasonable intent of the parties. They treated the subject sold as chattels ; just as in our every-day mercantile transactions, where coal, corn, sugar, wool, and various other commodities, are to be supplied on contract, neither party dreams of questioning the character of the property as personal and not real, though he knows perfectly well that the article to be delivered is as yet unsevered from the soil. Now, these *fructus industriales* are not in every case without the provisions of the 4th section ; for there are instances in the reports which might justify the remark of Littledale, J., that “where the land is agreed to be sold, and the vendee takes from the vendor the growing crops, the latter are considered part of the land.”³ We must search out some broader principle as a basis. This necessity becomes the more apparent when we turn to the decisions under the statute concerning *fructus naturales* ; for they by no means establish the converse rule, that such crops are invariably within section 4 as “interests in land.” Take, for instance, the law as laid down with reference to trees and timber.

¹ See 1 Sch. Pers. Prop. 126, 127 ; 1 Washb. Real Prop. 102 ; Co. Litt. 55 b.

² *Ib.* ; *Graves v. Weld*, 2 Nev. & M. 725 ; *Rodwell v. Phillips*, 9 M. & W. 503 ; *contra*, *Waddington v. Bristow*, 2 B. & P. 452.

³ *Littledale, J.*, in *Mayfield v. Wadsley*, 3 B. & C. 366 ; *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89.

Growing timber was the subject of a case very early reported, which the English Common Pleas decided in 1697. The question was, whether the sale of timber growing upon the land ought to be in writing under the Statute of Frauds, or might be by parol; and the court appear to have held that it might be by parol, "because it is but a bare chattel."¹ *Smith v. Surman*, decided in 1829, reviews the same subject more fully; but the conclusion arrived at Lord Abinger later interprets in this modified form: "It appears that a contract to sell timber growing was not held to convey any interest in the land; but that was where the parties contracted to sell the timber at so much per foot, and from the nature of that contract it must be taken to have been the same as if the parties had contracted for the sale of timber already felled."² The agreement was, in fact, to sell standing timber, which the owner had already begun to cut down, at so much a foot.³ Some stress has been laid in later cases upon the circumstance that the seller was to cut down the timber, and hence convert the property into a chattel by his own act;⁴ a fact, however, whose true importance we think depends upon the light it throws upon the mutual intent of the parties in passing property of this or that intrinsic character. In *Rodwell v. Phillips*, a written sale of fruit upon the trees, which evidently meant to convey the property before severance from the soil, was held to be the sale of an interest in lands; and to the same effect are several other English decisions concerning growing grass, standing undergrowth, and the like.⁵ These justify the position that an oral contract of *fructus naturales*, contemplating the transfer of the seller's property while they are still annexed

¹ Anon., 1 Ld. Raym. 182.

² *Smith v. Surman*, 9 B. & C. 561; Lord Abinger, C. B., in *Rodwell v. Phillips*, 9 M. & W. 501.

³ *Smith v. Surman*, *supra*.

⁴ See Bayley, J., in *Earl of Falmouth v. Thomas*, 1 Cr. & M. 105.

⁵ *Rodwell v. Phillips*, 9 M. & W. 501; *Campbell v. Roots*, 2 M. & W. 248; *Washburn v. Burrows*, 1 Ex. 107; *Scovell v. Boxall*, 1 Y. & J. 396.

to the soil, is within the 4th section as an interest in land ; while the oral sale of such products in the ground, but awaiting a severance before property can pass to the purchaser, is only a chattel sale.¹ Our American decisions have not in all instances kept the fine thread of distinction plainly in view : the cases regarding natural products under the Statute of Frauds are usually found to be irreconcilable ; and in New York and several other States it is laid down emphatically, that the sale of growing trees, with the right given the purchaser to enter and remove them hereafter, is the sale of an interest in lands within the statute, and must invariably be expressed in writing.² But, on the other hand, there are numerous opinions among our reported cases to justify the inference, that all contracts for the sale of trees or timber, still annexed to the soil, are susceptible of explanation ; that if, on the one hand, the parties meant to grant a present property to the unsevered trees, there is a sale contract concerning an interest in lands which must be put in writing ; but if, on the other hand, their obvious meaning was to sell trees whose property should not pass to the purchaser until the thing had been dissevered so as to exist as a chattel, the contract is not within the operation of this section as an interest in land, and necessarily unenforceable because wholly oral.³ Nor, upon this latter construction of the rule, is the circumstance, that the purchaser shall cut

¹ See Rolfe, B., in *Washburn v. Burrows*, *supra* ; Lord Abinger, in *Rodwell v. Phillips*, 9 M. & W. 501 ; Blackb. Sales, 9, 10 ; Benj. Sales, bk. 1, pt. 2, c. 2.

² *Green v. Armstrong*, 1 Denio, 550 ; *Howe v. Batchelder*, 49 N. H. 204 ; *Harrell v. Miller*, 35 Miss. 700 ; *Huff v. McCauley*, 53 Penn. St. 206.

³ See opinions in *Kingsley v. Holbrook*, 45 N. H. 313 ; *Sterling v. Baldwin*, 42 Vt. 306 ; *White v. Foster*, 102 Mass. 375, 378 ; *Byassee v. Reese*, 4 Met. (Ky.) 372 ; *Killmore v. Howlett*, 48 N. Y. 569 ; *Edwards v. Grand Trunk R. R. Co.*, 54 Me. 105. *Killmore v. Howlett* (which distinguishes *Green v. Armstrong*) makes it plainly the New York rule, that a contract to cut trees, standing upon the vendor's land, into cordwood, to be delivered at so much a cord, is not a contract for the sale of an interest in lands.

the trees instead of the vendor, decisive of the sale as one of an interest in lands.¹

Upon the whole, then, the current of English and American authorities, at the present day, seems to set in favor of some such rule as Judge Blackburn has laid down; to wit, that the crucial test is, whether the parties intended that the property in the thing should pass before or after its severance from the soil. To quote from this able writer: "It seems pretty plain upon principle that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. IV., c. 14 (Lord Tenterden's Act), if not of the 29 Car. II., c. 3. The agreement is, that the thing shall be rendered into goods, and then in that state sold; it is an executory agreement for the sale of goods not existing in that capacity at the time of the contract. And when the agreement is, that the property is to be transferred before the thing is severed, it seems clear enough that it is *not* a contract for the sale of goods; it is a contract for a sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case is, When do the parties intend that the property is to pass? If the thing perish by inevitable accident before the severance, whom do they mean to bear the loss? for in general that is a good test of whether they intend the property to pass or not; in other words, if the contract be for the sale of the things after they have become severed from the land, so as to become the subject of larceny at common law, it is, at least since the 9 Geo. IV., c. 14, a contract for the sale of goods, wares, and merchandise, within the 17th section. On the whole the cases are very much in conformity with these distinctions, though there is some

¹ Ib. And see Story Sales, 4th ed. § 263 *a*, Bennett's *n*.

authority for saying that a sale of emblements or fixtures, vesting an interest in them whilst in that capacity and before severance, is a sale of goods within the meaning of the 17th section of the Statute of Frauds, and a good deal of authority that such a sale is not a sale of an interest in land within the 4th section, which may, however, be the case, though it is not a sale of goods, wares, and merchandise within the 17th.”¹ To which Mr. Benjamin adds, from a study of the later English cases: “Nothing is to be found in the cases reported* since this perspicuous exposition was published, to affect its accuracy, or to shake the deductions drawn by the learned author from the authorities then extant.”² The point for which these eminent writers contend, appears to be well taken; though perhaps the doctrine as above set forth might better rest upon a lower substratum of legal principle, which we often encountered when studying heirlooms, emblements, and fixtures, in our first volume, — that a thing with the physical attributes of real property may become personal property by legal construction, because the parties have agreed to treat it as such, and bargain for it as a severed article; the law furthering their intention; and so *vice versa*, with that which is physically a chattel, whose annexation to the soil, so as to become real estate, they have mutually contemplated.³ Our conclusion from all the authorities, English and American, may be stated in these propositions: (1st.) Contracts for the sale of *fructus industriales*, or crops the product of annual labor (which the common law treated as essentially chattels, with the usual incidents thereof, as to attachment during the owner’s life, and transmission upon his death, even while annexed to the soil and unsevered), come within the provision, not of the 4th, but rather of the 17th section; that is to say, they are certainly not contracts

¹ Blackb. Sales, 9, 10.

² Benj. Sales, bk. 1, pt. 2, c. 2.

³ See 1 Sch. Pers. Prop. 122, 124, 126, 140. And see ib. 159 as to the doctrine of equitable conversion.

for the sale of interests in land. (2d.) Contracts for the sale of *fructus naturales*, still unsevered and annexed to the soil (to which the common law imputed no chattel character), come, on the contrary, within the 4th section, as involving the sale of interests in land. (3d.) But contracts of either class are further subject to this qualification, that if the mutual intent was to transfer the seller's property with attendant risks after a severance, and not before,—in other words, not until the thing should physically exist as a chattel beyond a peradventure,—the law favors the mutual intent, so far as to regard the sale as without the provision of the 4th section altogether. (4th.) So, too, it would appear, that, *vice versa*, a contract for the sale of an ungathered and unsevered crop, though coming within the denomination of *fructus industriales*, requires treatment as an interest in land within the meaning of the 4th section, if the parties clearly intended to pass property in it as part of the soil.¹

Contracts for the sale of fixtures are to be construed on corresponding principles. Any chattel which is intended for a fixture to the soil is, by destination, real estate; and a contract which purports not merely to sell, but to annex the thing so that it shall be permanently incorporated with the soil, cannot be pronounced a mere contract for the sale of goods within the 17th section.²

Another important inquiry, arising in the present connection, concerns the application of the 17th section to choses in action, or incorporeal property. In England, it is well settled that such property comes not under the denomination of "goods, wares, and merchandises," and hence that contracts for the sale of an incorporeal chattel of any species need not

¹ As to this last proposition, see *Earl of Falmouth v. Thomas*, 1 Cr. & M. 89; *Mayfield v. Wadsley*, 3 B. & C. 366, cited *supra*.

² *Cotterell v. Apsley*, 6 Taunt. 322; *Clark v. Bulmer*, 11 M. & W. 243. And see more fully, as to emblements and fixtures, 1 Sch. Pers. Prop. pt. 2, cs. 4 and 5.

comply with the statute. The first case in point is *Humble v. Mitchell*, decided in 1839, with reference to bank-shares. Said Denman, C. J.: "Shares in a joint-stock company like this are mere choses in action, incapable of delivery, and not within the scope of the 17th section."¹ And the principle of that decision has since been extended to various other incorporeal rights; so that (notwithstanding some doubts formerly entertained on the subject) the question is no longer considered an open one in the English courts.²

This construction, which seems most in conformity with the legislative intent as expressed in the time of Charles II., when incorporeal rights had no recognized status as the subject of legal sale and transfer, has been pursued in some parts of the United States.³ But the circumstances attending our later legislation on this subject might raise new questions as to the policy of the law-makers; since incorporeal property comes as much within the reason of an enactment against fraud as corporeal chattels, save as to the peculiar formalities which attend a complete transfer. In New York, kindred legislation has put equitable choses in action on a like footing with goods;⁴ and in several States the Statute of Frauds, as adopted, expressly provides for "things in action;"⁵ while again, in Florida, is to be found the preferable and sweeping expression "personal property," which might in every State well supersede the ancient tautological phrase elsewhere clung to, and make our modern policy plain and consistent.⁶

But in Massachusetts the court became the reformer, and,

¹ *Humble v. Mitchell*, 11 Ad. & E. 205.

² *Benj. Sales*, bk. 1, pt. 2, c. 2; *Tempest v. Kilner*, 3 C. B. 249; *Duncuft v. Albrecht*, 12 Sim. 189; *Watson v. Spratley*, 10 Ex. 222. But see earlier cases: *Com. Rep.* 354; *Prec. Ch.* 533; *Sel. Cas. Ch.* 113.

³ See *Whittemore v. Gibbs*, 24 N. H. 484; *Vawter v. Griffin*, 40 Ind. 593.

⁴ *Artcher v. Zeh*, 5 Hill, 200.

⁵ See statutes of Alabama, California, and New York, in *Browne Stat. Frauds*, 3d ed. appx.

⁶ *Southern Life, &c. Co. v. Cole*, 4 Fla. 339.

just before Lord Denman and his associates pronounced their contrary opinion, declared for this State, that the words "goods, wares, and merchandise" should properly embrace incorporeal personalty. There had already been intimations in various parts of America that contracts for the sale of stock must comply with the terms of the 17th section; an opinion which a Maryland court seems to have adopted, without giving reasons, as early as 1810.¹ *Tisdale v. Harris* is the leading Massachusetts case, and indeed the leading American one, on this side; and the opinion therein rendered by Shaw, C. J., has since served as a counterpoise to the contrary utterances of the English Queen's Bench.² Admitting that the question had not already been clearly adjudicated in Great Britain, and adverting to an early case of the kind, where twelve judges appear to have been equally divided, the court thus proceeds: "Supposing this a new question, now for the first time calling for a construction of the statute, the court are of opinion that, as well by its terms as its general policy, stocks are fairly within its operation. The words 'goods' and 'merchandise' are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word 'merchandise' also, including in general objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies. . . . There is nothing in the nature of stocks or shares in companies, which in reason or sound policy should exempt contracts in respect to them from those reasonable restrictions designed by the statute to prevent frauds in the sale of other commodities. On the contrary, these companies have become so numerous, so large an amount of the property of the community is now invested in them, and as the ordinary *indicia* of property arising from delivery and possession

¹ See *Colvin v. Williams*, 3 Har. & J. 38.

² *Tisdale v. Harris*, 20 Pick. 9 (A.D. 1837-38).

cannot take place, there seems to be peculiar reason for extending the provisions of this statute to them." A contract for the sale of shares of stock was therefore held to require proof by writing in the absence of the other requisites.¹ The same principle was later extended in the same State to promissory notes, notwithstanding the English rule had by this time become manifestly opposed ; and so the Massachusetts courts deliberately chose to follow *Tisdale v. Harris*, rather than *Humble v. Mitchell*.² This Massachusetts doctrine has received the support of Connecticut.³

The strength of the Massachusetts doctrine lies in its conforming with the spirit of the law. That this view is adapted to the age in which we live is confirmed by the fact that so many States have so amended the English statute in re-enacting its provisions as to let in incorporeal property. Nor elsewhere is the argument unworthy of notice, that an act passed by a State legislature in the nineteenth century might bear a nineteenth-century interpretation. But to construe statutory language on a general principle is always unsafe ; and the reasoning of *Tisdale v. Harris*, from the supposed extensive signification of such words as "goods" and "merchandise," has not gone undisputed, even in the United States. There is, for instance, a late Indiana decision, in which the word "goods" (used by the legislature of that State without the old redundant addition of "wares and merchandise") is narrowed to corporeal property, conformably to the English rule.⁴

(3d.) What standard of "price" or "value" brings a case within the statute ? This is the final inquiry presented under the present branch of our subject. We say "price"

¹ *Ib.*

² *Baldwin v. Williams*, 3 Met. 365.

^{*} *North v. Forest*, 15 Conn. 400.

⁴ *Vawter v. Griffin*, 40 Ind. 593; *Whittemore v. Gibbs*, 24 N. H. 484. And see *Browne Stat. Frauds*, §§ 296-298; *Story Sales*, § 263; 1 Sch. Pers. Prop. 39, 43, 87-94.

or "value," because legislation at this day employs sometimes the one word, and sometimes the other. "Price" was used in the original act of 29 Car. II.; but, in England, Lord Tenterden's Act, 9 Geo. IV., c. 14, § 7, has substituted the less precise and technical word "value" in reaffirming and amending the 17th section; the effect of which appears to be, not so much to substitute a different test as to give wider expression to the policy upon which this whole legislation against frauds and perjuries rests.¹ "Price" is the word still to be found upon the statute-books of most, if not all, of our American States.²

As to the standard of price or value, local legislation varies, naturally enough. For the price or value of "£10 and upwards" has always been the English rule.³ In the United States, the preference has been shown for a similar standard, as computed in Federal money; but varying, however, in precise amount, from thirty up to the round sum of fifty dollars, as local legislation may dictate, while a few States carry the exemption as high as two hundred dollars.⁴ Any contract of sale, therefore, which imports a price up to or beyond the statute standard (and, if no price was definitely fixed by the contract, the law will assume that a reasonable price, as measured by the reasonable value of the goods, was mutually intended⁵), is incapable of enforcement while the statute provision fails of compliance.

The price or value is not to be presumed to reach the statutory sum: on the contrary, he who claims protection of the statute must show affirmatively that his case falls under it.⁶ But the statute appears to cover a contract for the sale of

¹ Act 9 Geo. IV., c. 14, § 7; *Harman v. Reeve*, 25 L. J. C. P. 257.

² See Browne Stat. Frauds, 3d ed. appx.

³ Act 29 Car. II., § 17; Act 9 Geo. IV., c. 14, § 7.

⁴ See Browne Stat. Frauds, 3d ed. appx.

⁵ See *supra*, p. 201.

⁶ *Crookshanks v. Burrell*, 18 Johns. 58; Browne Stat. Frauds, § 311.

articles for which a sum rising to the legislative standard proves eventually payable by way of price, even though, consistently with their contract as made, the parties might have hoped to keep the price down below it; and they cannot agree to leave in uncertainty the actual amount payable without altogether endangering their means of reciprocally enforcing the bargain. The decision in *Watts v. Friend* involves this principle, though the point was not specially taken by counsel or court.¹ At all events, under a statute which substitutes the word "value" for "price," a case may, upon proper proof, be brought within the operation of its provisions, notwithstanding the contract itself leaves it doubtful whether a price less than the statute standard might not have been agreed upon.²

But litigation, under the present head, is chiefly concerned with cases which call for the application of that doctrine concerning the entirety of contracts to which we have elsewhere alluded.³ One purchases several things from the same person; and the inquiry arises, whether the standard which the legislature has fixed shall apply to the cost of each thing considered separately, or to the amount payable for the whole as a single sum total. Now, if there be an entire contract of sale involving several items, the statute must apply wherever the price or value of all together foots up to the standard prescribed by legislation; but if each item be a separate transaction, and the subject of a separate contract, no single

¹ *Watts v. Friend*, 10 B. & C. 446; Benj. Sales, bk. 1, pt. 2, c. 3; Browne Stat. Frauds, § 312. The reporter's note to this case, which involved the sale of turnip-seed, the future product of seed not yet sown, calls attention to a point not discussed in it; viz., that, when the bargain was made, it was uncertain whether the value of the seed to be produced would reach £10; and that, under the 4th section, it has been held that cases depending on contingencies which may or may not happen within the year are not within that section, though the event does not, in fact, happen within the year. We may, then, infer that the 17th section differs from the 4th in respect of the rule stated in the text.

² *Harman v. Reeve*, 25 L. J. C. P. 257.

³ *Supra*, p. 465.

one of them involving a price which reaches the standard, the statute is satisfied; and, once more, if the price of any article rise to the standard, and consequently the total price likewise, so long as each article was the subject-matter of its own contract, the statute takes effect only against the excessive item, without paying regard to the price or value of the whole. The criterion is, what was the total price or value of all the articles embraced under a single sale transaction?

To illustrate the rule. In *Baldey v. Parker*, the defendant went into the plaintiffs' shop and bargained for several articles. A separate price was agreed upon for each, and none exceeded in cost £10, the statute standard. The defendant asked to have an account for the whole sent to his house; which was done, showing a total cost of £70. This sum the defendant refused to pay, thinking it too large; and asked a discount from the whole bill, which the plaintiffs declined to make. A controversy followed, terminating in a lawsuit; and the defendant pleaded the Statute of Frauds. The court held the plea to be good, inasmuch as the bargain as concluded showed that the contract was an entire one for goods, embraced under different items, for the sum total of £70. Said Bayley, J.: "It is conceded here that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than £10. Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than £10 within the 17th section of the statute; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law."¹

Transactions of this kind must be viewed in their whole breadth in order to resolve the mutual intention. We have

¹ *Baldey v. Parker*, 2 B. & C. 37. See also remarks of Abbott, C J., Holroyd, J., and Best, J., *ib.* And see *Story Sales*, § 261; *Gilman v. Hill*, 36 N. H. 311; *supra*, pp. 464-467.

shown that an auction sale of effects is usually thought to raise a separate contract with the purchaser on each successive lot knocked down. This is not invariably the case, however ; for an auctioneer may so adjust the price in concluding with the purchaser of several lots at one vendue as to render the price computable under the statute as a sum total. A New Hampshire case goes quite far in this direction ; holding — contrary to the usual rule, and upon the suggestion that auction sales of goods are conducted in this country much the same as any other sales — that where the furniture and stable stock of a proprietor were sold at the same auction, and all upon the same terms and conditions, a purchaser who bought in separate articles upon separate bids and at separate and distinct prices had made an entire contract at an aggregate price exceeding the limit for cases without the statute.¹

We may further remark, that, where a single contract of sale which falls within the statute rule by reason of an excessive price or value stipulates something further, the entirety of the contract forbids a separation of its parts ; but the good portion and the bad portion are inseparable, and both must fall together. Thus, if the oral contract be partly for the sale of goods at a price which reaches the statute standard, and partly for the keeping of cattle, non-enforcement is the result as to the whole contract.²

¹ *Jenness v. Wendell*, 51 N. H. 63.

² *Harman v. Reeve*, 25 L. J. C. P. 257; *Irvine v. Stone*, 6 Cush. 508.

CHAPTER X.

STATUTE OF FRAUDS ; ORAL COMPLIANCE.

II. OUR present chapter considers, as concerning sale contracts, oral acts of compliance with the Statute of Frauds. These, as reference to the original 17th section will show, are two in number: (1st.) The buyer's acceptance and actual receipt of part of the subject-matter; (2d.) The giving of earnest or part payment. One or the other of these modes will suffice. In either alternative, the enactment is satisfied by a merely partial performance; and the buyer, rather than the seller, is looked to as the party who must do the requisite thing, though mutual assent to the act of part performance is doubtless contemplated. These topics will be successively discussed.

(1st.) Concerning the buyer's acceptance and actual receipt of part of the subject-matter. Says the Statute of Charles the Second: "Except the buyer shall accept part of the goods so sold, and actually receive the same."¹ This is, in substance, the language of American legislation likewise; but, in States whose codes make express mention of incorporeal chattels, a slightly different turn has been given to the phrase, without changing the main result.²

The obvious force of language like this is to exact the most

¹ 29 Car. II., c. 3, § 17; *supra*, c. 9.

² "Shall accept and receive part of such goods, or the evidences, or some of them, of such things in action." See enactments of California, New York, &c., in Browne's Stat. Frauds, 3d ed. appx.

scrupulous performance on the buyer's part in order to save the contract from failure : he must not only receive a portion of the subject-matter, but he must accept it. Hence, too, the seller must have made a thorough delivery of that portion of the goods which is claimed to satisfy the statute. The legislature is, indeed, silent as to acts of performance by the seller ; but so strenuously does it insist upon such acts of the buyer as would naturally follow delivery, that, as the irresistible conclusion, the seller must have fully delivered ; and furthermore, the contract continues insecure until the buyer has supplemented such performance by his unequivocal receipt and acceptance. We have shown that the common law of delivery or tender of goods under a contract of sale does not go so far as to postpone the seller's remedies to the period when a transfer of possession is finally effected ; for there may be a transfer of property before a transfer of possession, and he need not surrender custody until the price has been satisfactorily paid or secured. But there can be no delivery under the Statute of Frauds, irrespective of a full surrender of possession ; there can be no compliance, such as the text we have quoted recognizes, while the seller merely tenders possession to the buyer ; none while the seller's lien remains ; none while the buyer's right continues to return the goods because of their non-correspondence with the contract in kind and quality.¹ The statute is not satisfied if the seller asks instructions for shipment, and the shipment is not made ;² nor if the goods are shipped to the buyer, but lost on the way.³ And the buyer's acts of fulfilment so far hinge upon the seller's precedent act of delivery as to require that the acceptance and receipt shall be in pursuance of such delivery as the seller has made, not for some temporary purpose, but with the intent of divesting himself of possession as owner in

¹ See Browne Stat. Frauds, §§ 316-333; Story Sales, § 276.

² *Marsh v. Rouse*, 44 N. Y. 643.

³ *Maxwell v. Brown*, 39 Me. 98.

the buyer's favor.¹ It is when the buyer's acts show that both the seller and himself have rendered part performance that the statute becomes fully satisfied.

To turn now to the buyer, the party whose acts are decisive of oral compliance with the statute. Delivery of possession is good as far as it goes; but delivery will not take a single case out of the statute, nor is it in the seller's power to render the contract enforceable by any oral act of his own independently of the buyer's performance.² What the buyer must do under the statute is briefly epitomized,—to accept, and to actually receive. These two acts must concur as to the same identical portion of the subject-matter embraced under the contract: neither is acceptance satisfactory without actual receipt, nor actual receipt without acceptance. A carrier, we know, may actually receive goods, while it is not within his sphere to accept them on the buyer's behalf: moreover, instances have already been cited where a buyer accepted a thing as satisfactory before actually receiving it. But the Statute of Frauds permits of no half-way work: there must be acceptance, and actual receipt besides.

The preponderance of authorities at this day decidedly favors a discrimination between acceptance and actual receipt, thus justifying the framers of the enactment;³ though some eminent judges have thought the terms equivalent.⁴ The language of the statute is plain; but the decisions are in a confused state, and not easily to be reconciled; which is doubtless owing, in great part, to a long fluctuation of opinion as to the propriety of observing this distinction, and a frequent disposition to assert a rule for the one class of cases which applies to the other. Not only are the terms

¹ See *Brand v. Focht*, 1 Abb. N. Y. App. 185. But see *infra*, pp. 489–493.

² See *Nichols v. Morse*, 100 Mass. 523; *Marsh v. Rouse*, 44 N. Y. 643.

³ See Blackb. Sales, 22, 23; Benj. Sales, bk. 1, pt. 2, c. 4, § 1.

⁴ Cockburn, C. J., and Crompton, J., in *Castle v. Swarder*, 6 H. & N. 882; Erle, J., in *Marvin v. Wallace*, 6 E. & B. 726.

“ acceptance ” and “ actual receipt ” often interchanged in legal discussion, but the statute is construed as though it put as a test the seller’s act of delivery, instead of the buyer’s performance.¹

Some legal principles may be asserted of both classes taken together. Thus the doctrine of entirety renders the part acceptance and receipt of a single lot, though various lots were covered into the transaction, a sufficient compliance with the statute: and this time it is the enforcing party, instead of the defendant, who reaps the advantage of the doctrine; for the area of performance which satisfies the enactment becomes reduced to the fractional part of a fraction.² And so favorably do the courts incline to regard part performance as operating to take a contract out of the statute, that they have not only construed an auction sale of separate lots into one entire transaction, but even recognized performance as to an existing portion of goods, notwithstanding the remainder has no existence, but must be made to order. Thus, where ready-made lamps were ordered at the same time with others to be made to order, the acceptance and receipt of the former were held to take the latter out of the statute.³ It matters not that the entire contract covers articles of different kinds and qualities; for the part acceptance and receipt, as to a single item of one kind or quality, will suffice to bear up the other items, whatever be their character, provided only all were embraced in a single transaction.⁴

The acceptance and receipt of a part will satisfy the statute as to the whole; and though such part acceptance and re-

¹ See Pollock, C. B., in *Holmes v. Hoskins*, 9 Ex. 753.

² *Elliott v. Thomas*, 3 M. & W. 170; *Scott v. Eastern, &c. R. R. Co.*, 12 M. & W. 33; *Gault v. Brown*, 48 N. H. 183; *Mills v. Hunt*, 20 Wend. 431; *Jenness v. Wendell*, 51 N. H. 63.

³ See *Jenness v. Wendell*, *supra*; *Scott v. Eastern, &c. R. R. Co.*, *supra*.

⁴ *Elliott v. Thomas*, 3 M. & W. 170. And see *supra*, p. 465. But see *Price v. Lea*, 1 B. & C. 156.

ceipt would not, of course, legally amount to delivery of the balance, so as to justify one in suing as for goods sold and delivered, the seller is thus enabled to sue on the whole contract as for goods bargained and sold;¹ and since the buyer binds himself in such a case, so, too, does the seller become bound to deliver the residue of the goods under the contract.² It is well settled that the buyer's acceptance and receipt may suffice, notwithstanding both be subsequent to the agreement of sale.³ Nor is it necessary for the acts of acceptance and receipt to be contemporaneous.⁴ But both acts should be performed before the contract is sued upon;⁵ and acts of performance may relate to the whole as well as to a part of the subject-matter of sale.⁶ As to part acceptance and receipt, the statute imposes no arbitrary test: any substantial part, be it never so small in comparison with the whole amount contracted for, is capable of affording a full compliance with the law. A half-pound parcel out of a hog's-head of sugar, which the buyer accepts and receives as part of the entire quantity, has been held sufficient.⁷ But while some of the earlier cases appear to have indulged the enforcing party so far as to let a mere sample or specimen package lift the entire bulk out of the statute, the rule, as stated by Lord Ellenborough, was, that such a parcel must have been accepted and received by the buyer as part of the goods sold, notwith-

¹ Story Sales, § 279; *Atwood v. Lucas*, 53 Me. 508.

² *Ib.*; *Richardson v. Squires*, 37 Vt. 640.

³ Story Sales, § 280; *Bush v. Holmes*, 53 Me. 417; *Marsh v. Hyde*, 3 Gray, 331; *McKnight v. Dunlop*, 5 N. Y. 537; *Browne Stat. Frauds*, § 337.

⁴ *Cross v. O'Donnell*, 44 N. Y. 661; *Cusack v. Robinson*, 1 B. & S. 299; *Marsh v. Hyde*, 3 Gray, 331.

⁵ *Browne Stat. Frauds*, §§ 338, 348; *Bill v. Bament*, 9 M. & W. 36; *Tisdale v. Harris*, 20 Pick. 9.

⁶ See *Saunders v. Topp*, 4 Ex. 390; *Simmonds v. Humble*, 13 C. B. N. S. 258.

⁷ *Hinde v. Whitehouse*, 7 East, 558. And see *Rohde v. Thwaites*, 6 B. & C. 388.

standing the additional intent of the parties that it should be a sample or specimen of quality ; that the total must have been diminished, as the parties understood it, by so much quantity or bulk as the parcel represented.¹ This test, then, evidently excludes, as it ought, from the advantages which wait upon compliance, every case where a mere sample or specimen gift was made to the buyer as part of some other quantity or lot than that bargained for.² A just regard for the intention of the law-makers requires, we think, that the statute provisions shall not be evaded by any judicial misconstruction of acts and conduct which had substantial reference to gifts or samples merely as such ; and that satisfactory performance, to come within the present exception, must consist in the acceptance and receipt by the buyer of some part, however small, as strictly on account of the whole ; the question being one of fact, with the burden upon the party who alleges performance.³

One of several joint purchasers may accept and receive in part, so as to render the contract enforceable against all.⁴

Courts and text-writers are well agreed that the statute compliance by part acceptance and part receipt which we are considering presupposes a very thorough transfer of possessory rights from seller to buyer as concerns that portion of subject-matter which proves so delegated as to save the contract. By "accept and actually receive," say some jurists, we are to understand a complete appropriation of the whole or a part by the purchaser ;⁵ a statement whose force must depend upon the sense in which "appropriation" is used,

¹ *Hinde v. Whitehouse*, 7 East, 558 ; *Klinitz v. Surry*, 5 Esp. 267 ; *Gardner v. Grout*, 2 C. B. N. s. 340.

² *Ib.*

³ See *Smith v. Hudson*, 6 B. & S. 431 ; *Bush v. Holmes*, 53 Me. 417 ; *Danforth v. Walker*, 40 Vt. 257 ; *Davis v. Eastman*, 1 Allen, 422 ; *Stone v. Browning*, 51 N. Y. 211.

⁴ *Smith v. Milliken*, 7 Lans. 336.

⁵ See *Story Sales*, § 276.

but indicating a very decisive assumption of control. And since acceptance is the larger act, which draws in actual receipt, and declares one's final intention to retain the thing delivered as satisfactory, it must continually result that the buyer has become a full owner; that a complete transfer has taken place of possession, the right of possession and the right of property, when a chattel is both received and accepted by the buyer. But does this consequence necessarily follow? Is it an indispensable incident of statutory compliance that a full transfer of title should have taken place? The decided cases do not, thus far, seem to have given this question a careful consideration. Our former chapters show that here in America the courts have again and again sustained conditions in a sale that no property right in the subject-matter shall pass from seller to buyer, until the price is fully paid, though the buyer be allowed to take full possession.¹ It may be quite important to understand whether an oral contract of this kind is enforceable or not so soon as a portion of the goods has been accepted and received by the buyer. Then, again, there are other conditional contracts of sale which postpone the divestment of a seller's title, — on approval, on trial, and the like, — where the legal effect of part acceptance and receipt seems never to have been determined. A little reflection may convince a candid mind that the part acceptance and receipt which legislation admitted as one mode of putting the whole contract upon an enforceable footing meant to keep the question of payment out of sight; since a seller would rarely make a part delivery under an entire contract without meaning to wait for his pay until he had delivered the whole: he could hardly ask for his full price while there was more to deliver, nor would he be very likely to have stipulated for a *pro rata* payment. Part payment was one alternative presented under the statute for binding

¹ See *supra*, p. 305.

the purchaser, standing by itself; part acceptance and receipt its correlative and equally independent mode of satisfying the enactment. Why, then, should this right of property be thought a test of compliance at all, and thus perplex legal inquiry under what proves but a precautionary measure adopted by the legislature for making weighty bargains rest upon available proof? For it is to the possessory rights that such words as "delivery," "receipt," and "acceptance" immediately relate, — to acts which parade the intention of the parties in plain sight; not to the more abstract question of full-title transfer, inclusive of the right of property, which doubly baffles the inquirer when brought down to the fractional part of goods delivered. It seems to us a rational view of the subject, independently of all legal precedent, that acceptance and actual receipt under the 17th section should be taken to mean such acceptance and receipt, as, agreeably with the terms of the particular contract of sale, pass the present possessory rights from seller to buyer; but that if the contract as to the whole subject-matter were complex instead of simple in its stipulations, conditional instead of absolute as concerns the transfer of the seller's full title in the whole subject-matter sold, the buyer might well accept and receive a part (supposing no special conditions had attached to that specific portion), with the full possessory rights contemplated, and thereby render the contract enforceable. In other words, our present oral compliance with the statute is not incompatible with a transfer of property conditional instead of absolute, provided only the buyer take full possessory rights in a whole or a part of the goods accordingly.

Under such a rule, part acceptance and actual receipt could be given of chattels sold under an entire contract containing a condition, — as where the sale is of sixty machines on a six-months' trial; the property presumably remaining in the seller for six months after delivery, and one of these machines is received and accepted. This point appears not to have been

definitely decided; but intimations favorable to the rule are not wanting.¹ A sale, however, under condition, as an entire transaction, must not be confounded with an absolute sale which superadds some stipulation for a resale; for this is not a conditional, but a compound sale.²

Of far more practical importance is the application of this rule to sales accompanied by delivery upon condition that the seller's title shall not pass until payment or adjustment of the price; and so constantly are sales thus made, especially in America, as the current of decision goes, that the privilege of satisfying the statute by part acceptance and part receipt can avail little, if our principle fails. Yet the authorities by no means concede the principle. There can, of course, be no acceptance and receipt while a vendor's lien remains,—meaning that lien which the seller intends shall prevent his possessory right from passing to the buyer; and upon this tenable ground several decisions are based.³ But, on the suggestion that actual receipt is to be tested by the loss of the seller's lien, there appears to be a disposition in some quarters to regard every sale with the title transfer conditioned upon payment, as a sale with such a price-lien operating as must render the statute compliance impossible.⁴ The criterion, which loss of the seller's lien here affords, seems to us, however, most properly restricted to the keeping alive of his possessory right,—to that lien which prevents, not the transfer of property (which may have passed already, or may not pass for some time to come), but the transfer of the right of possession to the whole or the specific part whose acceptance and receipt are at issue. Thus, in a

¹ See *Williams v. Burgess*, 10 A. & E. 499, — a case involving written compliance with the statute; *Fay v. Wheeler*, 44 Vt. 292.

² *Watts v. Friend*, 10 B. & C. 446.

³ *Baldey v. Parker*, 2 B. & C. 37, *per* Holroyd, J.; *Holmes v. Hoskins*, 9 Ex. 753.

⁴ See *Maberley v. Sheppard*, 10 Bing. 99; *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Carter v. Toussaint*, 5 B. & Ald. 855; *Earl, C.*, in *Stone*

recent New Hampshire case, where, however, the distinction does not appear to be clearly put, may be found a sustaining precedent: for here it is directly ruled, as upon a novel question, that there may be such acceptance and receipt as satisfies the statute, even though the goods were sold upon condition that the property therein should not pass until the price was paid; that the passing of an absolute legal title is not essential.¹

Part acceptance and part receipt being once conjoined in the same subject-matter, the statute becomes satisfied; and it is no longer in the buyer's power to recall such act, or to change the contract as originally made, independently of the seller's consent, notwithstanding the remainder of the goods still awaits delivery.² But the buyer's acceptance and receipt can have no effect in furnishing compliance, if the seller has already disaffirmed the parol contract, and brought such disaffirmance to the buyer's notice.³

v. Browning, 51 N. Y. 211; *Castle v. Swooner*, 29 L. J. Ex. 235; s. c. 30 L. J. Ex. 310. In *Benj. Sales*, bk. 1, pt. 2, c. 4, § 2, it is said: "It is safe to assume as a general rule, that wherever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place." But the cases commented upon by this excellent writer show the limited scope of this word "lien;" and *that, by parting with the possession, the seller parts with his lien.*

¹ *Pinkham v. Mattox*, 53 N. H. 600. And see *Dodsley v. Varley*, 12 Ad. & E. 632, where it was said by Lord Denman, C. J.: "The plaintiff had not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant." And *Williams, J.*, observes, in *Wright v. Percival*, 8 L. J. N. S. Q. B. 258, — where a carriage, made to order, was regarded as fully accepted and received, although bad weather had prevented the buyer from taking it away at once from the seller's premises, — that "the fact of a lien being reserved is not a complete criterion of acceptance; it is a circumstance, but it is not the governing feature of the case."

² *Browne Stat. Frauds*, § 339; *Danforth v. Walker*, 40 Vt. 257; *Rapley v. Adey*, 1 Thomp. & C. (N. Y. Supr.) 126.

³ *Benj. Sales*, bk. 1, pt. 2, c. 4, § 1; *Taylor v. Wakefield*, 6 E. & B. 765.

We now proceed to examine the two classes of cases separately, — the first under acceptance, the next under actual receipt.

What, then, is partial acceptance, such as the statute contemplates? To quote from Judge Blackburn's treatise: "In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he *ought* to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts." ¹

The decisions concerning acceptance accord in general with this statement of principle; their variance with one another being mainly in the application of the rule to particular facts, and accordingly in the strength of proof requisite for showing one's intention. Acceptance may precede the delivery and receipt of the goods; as, for instance, where the customer, before ordering specific merchandise sent to his address, has inspected and tested its quality, and is satisfied.² But where no specific goods are selected in advance of their actual receipt, and the buyer has simply ordered any articles to be sent of a certain description, the acceptance of a whole or part is contemporaneous with, or rather follows immediately upon, its receipt; the buyer thereby announcing, in fact, that the thing

¹ Blackb. Sales, 22, 23.

² Cusack v. Robinson, 1 B. & S. 299.

supplied him meets his approval.¹ If the goods were sent to a certain place, and there received, and the buyer orders them sent to another place, where he examines and pronounces them "all right," the statute is satisfied at the second place, even if an acceptance at the first place be insufficiently proved.² Acceptance is an act, which, from its nature, requires more deliberation and involves more consequences than receipt; and, unless given in advance, ought not to be expected before the buyer has had reasonable time and opportunity under all the circumstances to examine and decide that all is right. There is a late Maryland case in point, where the buyer received a quantity of butter, unpacked the boxes, and upon examination objected to accepting the lot because of its poor quality; and the court ruled, that, if he only kept the goods long enough to examine their quality and quantity, no binding acceptance, within the Statute of Frauds, could be inferred.³ The more reasonable view, therefore, appears to be, that acceptance under the statute is not only an act of wider import and significance than actual receipt, but, in order to be intelligently rendered, requires so much more deliberation and such closer acquaintance with the property, that a suitable time and opportunity should be allowed the buyer in general, according to the circumstances, and the nature of the contract as involving specific or non-specific subject-matter, for exercising the option of keeping or rejecting, before the statute will hold him; and that the buyer's "acceptance" is not necessarily contemporaneous with his "actual receipt" of a whole or a part of the subject-matter, but may precede or follow such receipt, with any reasonable interval.⁴ The *dictum* of Lord Campbell in *Morton v. Tibbett*,

¹ See *Nicholson v. Bower*, 1 E. & E. 172.

² *Saunders v. Topp*, 4 Ex. 390.

³ *Hewes v. Jordan*, 39 Md. 472.

⁴ See *Smith v. Hudson*, 6 B. & S. 431; *Stone v. Browning*, 51 N. Y. 211; *Knoblauch v. Kronschnabel*, 18 Minn. 300; *Gilman v. Hill*, 36 N. H. 311; *Gorham v. Fisher*, 30 Vt. 528; *Maxwell v. Brown*, 39 Me. 98.

to the effect that "acceptance is to be something which is to precede or at any rate to be contemporaneous with the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined," ought, therefore, to be taken with such qualifications.¹ It must be admitted, however, that the English courts are not in full accord upon the range of acceptance; and that while some judges evidently think that an acceptance and receipt, to satisfy the statute, need not go so far as to preclude the buyer from objecting to the goods, others (including the most recent) establish that there can be no acceptance where there has been no opportunity of rejecting.² But, at all events, acceptance always takes much wider scope where the subject-matter was unascertained when the contract was formed, than in sales of specific ascertained chattels; and the nature of the act depends upon the nature of the contract. Thus, if the sale were by sample, which carries with it the right to inspect and reject the goods if found not equal to the sample, there can be no acceptance, under the statute, of any portion of the bulk, until the buyer has had time to inspect the article, and see whether it corresponds with the sample.³ But acceptance of a specific thing sent home to the buyer might involve scarcely more than looking into the package to make sure that the identical thing was there.

An agent with authority from the buyer to receive is not necessarily the buyer's authorized agent to accept; since acceptance is the larger act, and requires the larger authority.

¹ *Morton v. Tibbett*, 15 Q. B. 428, *per* Lord Campbell, C. J. (1850).

² See *Benj. Sales*, bk. 1, pt. 2, c. 4, § 1, citing *Cockburn, C. J.*, in *Castle v. Swarder*, 6 H. & N. 832; *Martin, B.*, in *Hunt v. Hecht*, 8 Ex. 814; *Pollock, C. B.*, *Bramwell, B.*, and others, in *Coombs v. Bristol, &c. R. R. Co.*, 3 H. & N. 510; also *Smith v. Hudson*, 6 B. & S. 431; *contra*, *Blackburn, J.*, in *Cusack v. Robinson*, 1 B. & S. 299; *Crompton, J.*, in *Currie v. Anderson*, 2 E. & E. 592. And see *Parker v. Wallis*, 5 E. & B. 21.

³ *Smith v. Hudson*, 6 B. & S. 431.

Thus, delivery to a common carrier, and his actual receipt of the goods, although carrying over the right of property and risks upon the usual principles of the law of sales, constitute no such acceptance as would bind the purchaser and satisfy the statute.¹ This rule is well settled ; and the same may be said of wharfingers and others similarly employed by the seller for mere purposes of custody.² But, as an agent's powers may be enlarged by means of authority appropriately conferred by his principal, so is it true that a carrier, wharfinger, or other party whom the buyer has duly authorized to accept the goods on his behalf, may make such acceptance, and so fulfil the statute requirements.³

Acceptance, to satisfy the statute, should be distinct and unequivocal ; but it is well settled that the buyer's own acts and conduct may be construed into a binding acceptance. Some subtle distinctions are furnished by the decisions, which, like jury verdicts, are apt to differ, and cannot be safe precedents. If the buyer, upon inspection, declares his satisfaction with the goods, and his intention to retain them, in unmistakable terms, he, of course, accepts them in the fullest sense.⁴ But, as the evidence is not usually so clear as this, the accepting intention must, in general, be otherwise shown : and very strong proof of this intention is furnished by some decisive act of ownership on the buyer's part ; as where he sells to another person, pledges, lends, gives, or consumes the articles, or otherwise clearly assumes dominion over them.⁵

¹ *Coombs v. Bristol, &c. R. R. Co.*, 3 H. & N. 510 ; *Smith v. Hudson*, 6 B. & S. 431 ; *Benj. Sales*, bk. 1, pt. 2, c. 4, § 1 ; *Rodgers v. Phillips*, 40 N. Y. 519 ; *Story Sales*, § 276 ; *Maxwell v. Brown*, 39 Me. 98 ; *Johnson v. Cuttle*, 105 Mass. 447 ; *Jones v. Mechanics' Bank*, 29 Md. 287.

² *Hart v. Bush*, E. B. & E. 494 ; *Hunt v. Hecht*, 8 Ex. 814 ; *Quintard v. Bacon*, 99 Mass. 185.

³ See *Snow v. Warner*, 10 Met. 132 ; *Spencer v. Hale*, 30 Vt. 314.

⁴ See *Simmonds v. Humble*, 13 C. B. n. s. 258 ; *Cusack v. Robinson*, 1 B. & S. 299 ; *Saunders v. Topp*, 4 Ex. 390.

⁵ *Chaplin v. Rogers*, 1 East, 192 ; *Beaumont v. Brengeri*, 5 C. B. 301 ; *Morton v. Tibbett*, 15 Q. B. 428.

And as acquiescence may be silent, while disapproval requires positive expression, the buyer is further shown to have accepted the goods within the statute whenever he has unreasonably delayed returning them, or giving notice of their rejection.¹ Such conduct, while resting upon the least direct testimony, unless conjoined with some of the other circumstances mentioned, affords, also, presumptive proof that the buyer has assumed to act as owner.

On the other hand, numerous instances might be cited in which the proof of acceptance was held an insufficient fulfilment of the statute ; as where one, on receipt of the goods, distinctly refused to accept, without delaying his decision longer than was reasonable for inspecting the goods upon their arrival, as he had a right to do, to ascertain their correspondence in kind, quantity, and quality, with the contract.² And, as acceptance is not usually given before one's goods are in a suitable condition for inspection, the buyer's conduct, with reference to a subject-matter but partially completed, or requiring to be separated from a larger quantity, or otherwise incapable of immediate delivery, is not presumed to constitute an acceptance within the statute ; neither can any thing be truly accepted in our present sense (whatever might be said of the waiver of one's rights) while the subject-matter is still unascertained, and unappropriated to the contract of sale.³ Nor are slight acts of apparent ownership over the subject-matter, which are quite consistent with the purpose of preserving the seller's rights unimpaired under the contract, to be deemed conclusive proof of acceptance.⁴ So long as the buyer con-

¹ *Coleman v. Gibson*, 1 Moo. & Rob. 168 ; *Farina v. Home*, 16 M. & W. 119 ; *Meredith v. Meigh*, 2 E. & B. 364 ; *Benj. Sales*, bk. 1, pt. 2, c. 4, § 1 ; *Hunter v. Leavitt*, 36 Ind. 141 ; *Treadwell v. Reynolds*, 39 Conn. 31 ; *Thompson v. Menck*, 4 Abb. N. Y. App. 400 ; *Rappleye v. Adees*, 1 Thomp. & C. (N. Y. Supr.) 126.

² *Hunt v. Hecht*, 8 Ex. 814 ; *Hewes v. Jordan*, 39 Md. 472.

³ *Hunt v. Hecht*, 8 Ex. 814 ; *Maberley v. Sheppard*, 10 Bing. 99.

⁴ *Tempest v. Fitzgerald*, 3 B. & Ald. 680 ; *Holmes v. Hoskins*, 9 Ex. 753.

tinues to have a right to object to the goods, and neither transcends his reasonable time, nor exercises in the interim inconsistent acts of dominion over the subject-matter, he is not presumed to have accepted within the meaning of the statute ; and the right to inspect involves the right to have the goods put into a condition fit for inspection.¹ Pending his decision as to acceptance, the buyer may make a preliminary examination, and thereupon suspend his final judgment to a further period not unreasonably distant ; in which case his acts and conduct throughout are to be construed together for determining whether a final acceptance was reached.² In short, equivocal acts on the buyer's part are not readily construed into a statute acceptance, unless aided by the lapse of time or other favoring circumstances.³

Keeping unreasonably long the *indicia* of title, such as bills of lading, may amount to a statutory acceptance of the goods which they represent ; and this upon the principle already noticed, that a buyer, to stand aright, should have exercised promptly and becomingly whatever right to object to the goods his contract gives him. More especially is this true where the buyer in other respects acts as owner of the goods.⁴ But conclusive acceptance is not shown by the mere fact that the bill of lading was left with the buyer's clerk in the buyer's absence ; there being no testimony showing any unreasonable delay on the buyer's part in objecting to the goods, or more positive acceptance, or the exercise of dominion over the goods on his part, and the clerk appearing to have no author-

¹ *Curtis v. Pugh*, 10 Q. B. 111 ; *Smith v. Hudson*, 6 B. & S. 431 ; *Howe v. Palmer*, 3 B. & Ald. 321 ; *Hanson v. Armitage*, 5 B. & Ald. 557 ; *Hewes v. Jordan*, 39 Md. 472 ; *Nicholson v. Bower*, 1 E. & E. 172.

² See *Nicholson v. Bower*, *Hewes v. Jordan*, *supra* ; *Saunders v. Topp*, 4 Ex. 390.

³ *Shindler v. Houston*, 1 Comst. 261, and cases cited.

⁴ *Currie v. Anderson*, 2 E. & E. 592 ; *Meredith v. Meigh*, 2 E. & B. 364.

ity to receive either the bill or the goods on the buyer's behalf.¹

Upon the whole, the statute acceptance is mainly a question of fact; and a jury, under the guidance of the court, will naturally weigh all the circumstances which tend to show the buyer's real intention in the premises, and render their verdict accordingly.²

The class of cases remaining to be considered is that which teaches us what is actual receipt. "The receipt of part of the goods," says Judge Blackburn, "is the taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not."³ Much of the law, as to the statutory receipt, we have incidentally touched upon already; and as much of the discussion in the courts in cases of dubious intent centres upon "acceptance," or "delivery and acceptance" (as though the statute had used the word "delivery" instead of "actual receipt"), a full acceptance may usually be expected to carry the taking of possession along with it. Actual removal of the goods, in part or wholly, from seller's to buyer's custody, is a common, though, as we shall soon see, not an invariable

¹ *Quintard v. Bacon*, 99 Mass. 185. Whether marking the goods with the purchaser's name or initials should constitute acceptance or not seems to depend upon the surrounding circumstances, and especially upon the buyer's participation in such act. It is a fact susceptible of explanation, and not conclusive of acceptance in itself, though often strongly corroborative of other testimony tending in this direction. See *Benj. Sales*, bk. 1, pt. 2, c. 4, § 1, citing *Anderson v. Scott*, 1 Camp. 235, *n.*, disapproved by *Saunders v. Topp*, 4 Ex. 390; *Rappleye v. Ade*e, 1 Thomp. & C. (N. Y. Supr.) 126.

² See *Story Sales*, § 278.

³ *Blackb. Sales*, 22-24.

accompaniment of this "actual receipt" by the buyer; but, whatever be the buyer's method of receiving possession, the seller must finally part control, so far as he is concerned, and that with the intention of vesting the right of possession in the buyer.¹ There may be a receipt of *indicia*, such as bills of lading, sufficient to satisfy the Statute of Frauds;² but this, to be effectual, must consist with the seller's intention of surrendering the same; nor can one who takes possession of a bill of lading without permission, and insists upon retaining it against the seller's remonstrance, avail himself of the instrument as a means of enforcing the oral contract.³

The goods of which the buyer receives possession under the statute may, at the time, be in his own custody, or in a third person's custody, or in the custody of the seller.

Where the goods are already in the buyer's custody, it is by virtue of some agency or bailment; and his actual receipt as seller then occurs when the character of the possession changes, and the buyer, with the seller's consent, ceases to hold as agent, and begins to hold as owner. The difficulty in such cases is, not in the principle, but in proving that a virtual receipt has taken place. Parol evidence is admissible, however, as to facts and circumstances of whose effect the jury may form an estimate. A leading case under this head is *Edan v. Dudfield*, where the court upon full consideration declared that one person in possession of another's goods might become their purchaser by parol, and might, without any writing between the parties, do subsequent acts amounting to the statute compliance. The facts here showed that the defendant, who held possession of the plaintiff's goods and acted as his custom-house agent, was his creditor to a considerable amount: whereupon it was

¹ See *supra*, p. 485; *Maberley v. Sheppard*, 10 Bing. 99; *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Phillips v. Bistolli*, 2 B. & C. 511.

² *Chaplin v. Rogers*, 1 East, 192.

³ *Brand v. Focht*, 1 Abb. N. Y. App. 185.

mutually agreed, first, that the agent might sell at a certain price for his principal; and afterwards that he might himself buy the goods in for less than the cost price; in pursuance of which agreement, the sale was accordingly made.¹ But, to make out such a case, the conduct of the former agent or bailee, in dealing with the goods in his possession, should consist with the supposition that his former possession has changed into ownership.² Actual receipt is effected, in this class of cases, without any substantial removal, or change of position, of the goods themselves.

Where the goods are in a third person's custody, there are three distinct parties concerned in effecting a transfer of possession; and the question is, how far their acts and conduct should blend together in order to fulfil the statute. Here, too, there need be no removal of the goods from the custodian's control; for whenever seller, buyer, and custodian all agree that the custodian shall cease to hold for the seller, and shall thereafter continue to hold for the buyer, there is an actual receipt by the buyer which satisfies the law, though the goods themselves remain undisturbed: in other words, the custodian, having been agent of the seller, does some act by way of attorning over and becoming agent of the buyer, wherever no immediate removal is contemplated; and thereby a legal change of possession is completely wrought.³ The only real discrepancy in the authorities concerns this third party's necessary participation in the transfer in order to take the case out of the statute. If the buyer actually removes the goods, or a part of them, with the tacit or express permission of both seller and custodian, the case, of course, is clear as concerns receipt; but if he has not

¹ *Edan v. Dudfield*, 1 Q. B. 302.

² See *Lillywhite v. Devereux*, 15 M. & W. 285, and *Taylor v. Wakefield*, 6 E. & B. 765, where the evidence of a change of possession was deemed insufficient.

³ *Blackb. Sales*, 28, 29; *Benj. Sales*, bk. 1, pt. 2, c. 4, § 2.

concluded matters with the custodian, and yet has received the goods so far as the seller's own act could aid him in obtaining possession, the English cases require an attornment to the buyer, so to speak, from the custodian ; while in some parts of this country it is, on the other hand, thought to be enough for the buyer to give the custodian notice that he has received the *indicia* of title from the seller : but neither in England nor in America is the buyer's receipt of *indicia* from the seller held to be a full compliance with the statute, so long as the custodian utterly fails of being recognized in the matter.¹ Thus, supposing the seller to have given the buyer a delivery order upon his warehouseman or other bailee, so soon as this order is presented, and the bailee assents and agrees to hold the goods on the buyer's account, there is within the statute a sufficient receipt of the goods by the buyer. But the best authorities assert that it is not enough for the buyer to notify the custodian that he holds this order, and tell him to follow his directions ; that, on the other hand, these goods must, in pursuance of the order and the custodian's assent, be placed within the new owner's control.² The Massachusetts rule, on the contrary, appears to let the buyer's notice to the third person that he holds the order afford compliance against the seller's attaching creditors, but not the buyer's receipt of the order without giving such notice.³ Between such conflicting authorities, the local courts must decide for themselves. We may add, that the custodian who wrongfully refuses to attorn over to the buyer, in order to enable the latter to receive, might render himself liable in damages for the ill consequences ensuing ; so that the party

¹ Benj. Sales, bk. 1, pt. 2, c. 4, § 2 ; Story Sales, § 277 ; Searle v. Keeves, 2 Esp. 598 ; Simmonds v. Humble, 13 C. B. N. s. 258 ; Bentall v. Burn, 3 B. & C. 424 ; Farina v. Horne, 16 M. & W. 119 ; Marsh v. Rouse, 44 N. Y. 643. But see Boardman v. Spooner, 13 Allen, 353.

² Bentall v. Burn, Farina v. Horne, and Marsh v. Rouse, *supra*.

³ Boardman v. Spooner, 13 Allen, 353.

holding the *indicia* is not altogether remediless, even though he fails to procure the custodian's assent to the proposed change.¹

Where the goods are at the time upon a third person's premises, such person not having their actual custody, or are in some public place equally accessible to buyer and seller alike, oral compliance with the statute may be established, according to the circumstances; and the buyer's actual receipt could be inferred from the seller's permissive acts, in placing them at his disposal;² but not, however, if it appeared that some further acts were mutually contemplated to precede the actual transfer of possession.³

Where the goods are in the seller's custody (which is the usual case), it often becomes extremely difficult to say at what precise moment the buyer may be said to receive the goods at his hands. By this we refer to instances of constructive receipt, where the intention that a change of possession shall take place is not evinced by some decisive act; for were the goods actually removed and taken bodily into the buyer's custody, apart from the seller, in every case, the statute compliance would easily be proved. Taking possession, with the seller's acquiescence, of the whole or part of the subject-matter, and carrying it away, is evidence, not only of actual receipt, but of the exercise of an important act of ownership, and can hardly fail to be conclusive of the issue.⁴

Constructive receipt may be shown where the seller holds the goods at the time of the bargain, and then changes his possession so as to become the buyer's bailee, and continue to hold in that character: here his original rights as seller are gone, and proof of the change ought to be distinct and clear. Thus, where the purchaser of horses from a dealer leaves

¹ See *Bentall v. Burn*, 3 B. & C. 423, *per curiam*.

² *Tansley v. Turner*, 2 Bing. N. C. 151; *Cooper v. Bill*, 3 H. & C. 722.

³ *Shindler v. Houston*, 1 Comst. 261; *Young v. Blaisdell*, 60 Me. 272.

⁴ *Chaplin v. Rogers*, 1 East, 192; *Vincent v. Germond*, 11 Johns. 283.

them with the seller on livery, with the latter's consent, the dealer's possession is converted into that of a bailee;¹ and where sheep are selected out of a shepherd's flock, purchased, marked, and then turned back into the sheep-fold, we are to presume that the seller meant to become the buyer's custodian.² If there be a plain alteration in the character of the possession, — if, for instance, the horse-dealer takes the horse from his sale-stable and ties him up in his livery-stable, or the shepherd puts the sheep into a separate enclosure for a time, — the changed character in which the seller continues to hold the chattel becomes the more clearly marked; but there might be evidence enough to go to a jury, though the position of the subject-matter had suffered no change, and the seller retained it.³

In *Beaumont v. Brengeri*, a carriage which the defendant had purchased was allowed to remain in the seller's shop for convenience; and it was held, upon the facts shown, that the seller had changed his character to that of warehouseman, and that there was an actual receipt by the buyer within the statute.⁴ In *Castle v. Swarder* — a case where the decision of the English Exchequer Court was in 1861 reversed on appeal — will be found an exhaustive discussion of the subject of constructive receipt, with full affirmation of the doctrine as applied to a sale on a term of credit.⁵ Martin, B., had quite pointedly expressed himself to the contrary in the lower court: "Now it does seem to me a most extraordinary thing to say that a man accepted and actually received goods as vendee, whilst all the time they were in the possession of the vendors, and whilst they had a right to them until the de-

¹ *Elmore v. Stone*, 1 Taunt. 458.

² *Rappleye v. Adey*, 1 Thomp. & C. (N. Y. Supr.) 126.

³ See *Elmore v. Stone*, 1 Taunt. 458; *Marvin v. Wallis*, 6 E. & B. 726; *Beaumont v. Brengeri*, 5 C. B. 301; *Castle v. Swarder*, 30 L. J. Ex. 310; *Janvrin v. Maxwell*, 23 Wis. 51.

⁴ *Beaumont v. Brengeri*, 5 C. B. 301.

⁵ *Castle v. Swarder*, 29 L. J. Ex. 235; 30 ib. 310, and 6 H. & N. 832.

fendant paid the price. As these goods were sold subject to the payment in six months, if the six months for payment elapsed, though the defendant had a right to the possession of the goods or might have brought an action within the six months, nevertheless it is clear when the six months elapsed the lien would revive.”¹ But Cockburn, C. J., on appeal to the Exchequer Chamber, thus put the case on its true footing: “For six months the buyer was entitled to claim the immediate delivery of the specific goods appropriated to him. The question then arises whether the possession which actually remained in the sellers was a possession in the sellers by virtue of their original property in the goods, or whether it had become a possession as agents and bailees of the buyers.” Accordingly, not meaning to overrule the lower court as to the expiration of a term of credit and its legal effect, the appellate tribunal found that there were certain facts proven which warranted sending the case to the jury to ascertain whether the character of the seller’s possession had not changed while he held the goods.²

But where the seller retains possession of the purchased goods, there should be distinct proof of this intended change of ownership, and no countervailing circumstances, in order to satisfy the statute; for whether it be in destroying a seller’s lien for his price, or in tempting the sale parties to fraudulent collusion between themselves in order to defeat the rights of others, the doctrine is fraught with mischief.³

Actual receipt implies actual delivery; and as there may be constructive receipt, so may there be constructive delivery. If the seller undertakes to forward the goods to the buyer, the goods are received by the latter as soon as his own agent receives them; and the extent of this principle may be studied

¹ *Castle v. Swoorder*, 29 L. J. Ex. 235.

² *Castle v. Swoorder*, 30 L. J. Ex. 310. And see *Barrett v. Goddard*, 3 Mas. 107.

³ See *Story Sales*, § 278; *Blackb. Sales*, 28, 29.

in the light of decisions which have been elsewhere adduced respecting the transportation of purchased goods. A common carrier is not, ordinarily, an agent empowered to accept, but he is a suitable agent to receive on the buyer's behalf; and to this extent his actual receipt will satisfy the statute.¹ So, too, may a warehouseman, or any other middleman, be constituted an agent for the same purposes.² And, since acceptance might have preceded the seller's act of delivery, an oral compliance is sometimes irrevocably fixed as soon as the carrier has received a part of the goods at the seller's hands.³ But delivery upon the seller's vessel, or to any carrier who really represents the seller, for the purpose, it may be, of securing his rights, during the transit of the subject-matter, and pending payment, is inconsistent with the idea of putting the buyer into immediate possession; nor, under such circumstances, can the latter be said to have actually received the goods, personally or through his representative. So, too, if one sells goods to be delivered by himself at a specified place, there is no change of possession or an actual receipt by the buyer until the goods arrive at the specified place.⁴

(2d.) Concerning the giving of earnest or part payment. The statute, as its language shows, awaits here, as before, an oral compliance by the buyer; for, to use the words of 29 Car. II., the buyer must "give something in earnest to bind the bargain, or in part payment;"⁵ two modes being thus presented, of which the former has so fallen into disuse, that earnest and part payment are often treated at the present day

¹ *Cusack v. Robinson*, 1 B. & S. 299; *Smith v. Hudson*, 4 B. & S. 431; *supra*, pp. 411-414, 497.

² See *Hunter v. Wright*, 12 Allen, 548.

³ *Cross v. O'Donnell*, 44 N. Y. 661.

⁴ *Astey v. Emery*, 4 M. & S. 262; *Smith v. Hudson*, 6 B. & S. 431. And see *supra*, p. 400.

⁵ Stat. 29 Car. II., c. 3, § 17; *supra*, p. 444.

as meaning the same thing;¹ while some of the United States have the local enactment requiring that the buyer shall simply "at the time pay some part of the purchase-money."²

The giving of earnest and part payment are two distinct things, if we may trust to the analogies of the civil law, which required, for earnest, a "thing," such as a ring, as a sign, proof, or symbol, that the bargain was concluded, being usually a gift or token; whereas part payment was something in money, and, if given by way of earnest, went properly towards discharging the price.³ Examples of this custom are to be found in the old English reports; but it now appears to be well settled, that, under our Statute of Frauds, whatever is given must be in money or money's-worth, and computable accordingly. Whether the buyer means it as an extra gift, or in part payment, he must at least part with what he tenders: he cannot cross the seller's hand with a coin, and then put the coin back into his pocket.⁴ And, as our statute puts it upon the buyer to comply in this instance, it is of little practical avail to know that the seller could have given that earnest under ancient law.⁵

The object of the statute is fairly met, as it would appear, notwithstanding the giving of earnest or making part payment takes place subsequently to the oral bargain; its effect being, as in the other instances we have noted, to render a bargain enforceable which before could not be sued upon; so that when it is given or made, and accepted upon a full understanding of the parties, the statute becomes fulfilled.⁶

¹ Benj. Sales, bk. 1, pt. 2, c. 5; Story Sales, §§ 273-275; Browne Stat. Frauds, § 341.

² See stats. N. Y., Cal., Wisconsin, &c.; Browne Stat. Frauds, 3d ed. appx.

³ Dig. 19, 1, 11, § 6; Benj. Sales, bk. 1, pt. 2, c. 5.

⁴ See *Goodall v. Skelton*, 2 H. Bl. 316 (A.D. 1794); *Blenkinsop v. Clayton*, 7 Taunt. 597; Browne Stat. Frauds, § 341.

⁵ Dig. 19, 1, 11, § 6; Benj. Sales, *supra*.

⁶ See *Parke, B., in Walker v. Nussey*, 16 M. & W. 302; *Dewey, J.,*

The fulness of oral compliance is here contemplated, as in acceptance and receipt; and though the buyer in the present, and, unlike the former case, naturally takes the initiative, the statute is not satisfied until the seller in his turn accepts and receives the payment; and as to the portion upon which the law fastens, there must be a mutual understanding.¹ Hence, if the buyer transmits money in part payment, which the seller immediately returns as a token of his refusal to accept it, no sufficient part payment takes place.² Nor can any owner of goods obstruct third parties by putting an assignment on record in favor of a non-concurring person.³ The seller's act in receiving payment, like the buyer's in making it, may be performed through an agent; and the law of agency permits of subsequent ratification, as well as previous authority, on the principal's part, though the proof of authority should be established without resort to the verbal agreement which depends for enforcement upon it.⁴ Nor does it unfrequently happen that there has been both part payment and part acceptance and receipt, so as doubly to remove the case from the operation of the statute.⁵

The deposit of money with a third person by the parties to an oral sale, to be by him paid to either of them as a forfeiture if the other neglects to fulfil his part of the bargain,

in *Thompson v. Alger*, 12 Met. 428; *Browne Stat. Frauds*, § 343; *Story Sales*, § 273. *Semble*, that, under the New York statute (notwithstanding the peculiar phraseology as to time noted *supra*, p. 508), part payment need not be at the time of making the contract. *Hawley v. Keeler*, 53 N. Y. 114, *per Andrews, J.*; *Bissell v. Balcom*, 39 N. Y. 275.

¹ *Hicks v. Cleveland*, 48 N. Y. 84; *Hawley v. Keeler*, 53 N. Y. 114; *Edgerton v. Hodge*, 41 Vt. 676.

² *Edgerton v. Hodge*, *supra*.

³ *Hicks v. Cleveland*, 48 N. Y. 84.

⁴ *Hawley v. Keeler*, 53 N. Y. 114.

⁵ *Richardson v. Squires*, 37 Vt. 640; *Allen v. Aguirre*, 3 Seld. 543.

is not a giving of earnest or part payment such as the statute permits.¹

The decisions under our present head turn chiefly upon the sufficiency of part payment when the discharge of a debt due from the seller, as well as payment of a price by the buyer, has entered into the calculation of the sale. Where chattels are sold under an oral contract which comes within the purview of the statute, and it is part of this contract that the buyer shall, in consideration of the sale, offset a debt due him from the seller, and pay the residue, this offset stipulation alone has not the effect of a part payment by the buyer.² But we are not thereby to infer that the statute means to discountenance the application of mutual debts in operating satisfaction; for the reason of the rule is, that an oral bargain with this contemporaneous stipulation as part of the verbal agreement really extinguishes no debt, but is part of the unenforceable contract itself. It may be well inferred, notwithstanding, that any subsequent agreement to set off against the price the seller's debt, or an entirely independent contract contemporaneous with the sale of like import, would constitute part payment within the statute, if thereby the debt be actually discharged; and so, in fact, has it been decided.³

That compliance which the giving of earnest or part payment affords, we may add, does not necessarily involve the transfer of a legal title from seller to buyer; another proof, in addition to those already adduced, that it is the acquisition of possessory rights by the buyer, and not the right of property, that the 17th section makes its direct concern.⁴ The true

¹ *Howe v. Hayward*, 108 Mass. 54; *Noakes v. Morey*, 30 Ind. 103.

² *Walker v. Nussey*, 16 M. & W. 302; *Artcher v. Zeh*, 5 Hill (N. Y.), 500; *Mattice v. Allen*, 3 Abb. N. Y. App. 248.

³ *Benj. Sales*, bk. 1, pt. 2, c. 5; *Dow v. Worthen*, 37 Vt. 108; *Cotterill v. Stevens*, 10 Wis. 422; *Story Sales*, § 273, 4th ed., *Bennett's n.*

⁴ *Benj. Sales*, bk. 2, pt. 2, c. 4; *Bach v. Owen*, 5 T. R. 409; *Nesbit v. Burry*, 25 Penn. St. 208; *Groat v. Gile*, 51 N. Y. 431; *supra*, p. 492.

rule, as to vesting the seller's rights of ownership in the buyer, is, that the test is found, not in the circumstance that earnest or part payment was given, but in the contract of sale itself, as rightly interpreted, which was thereby rendered enforceable.¹

¹ But see *contra*, *Hinde v. Whitehouse*, 7 East, 558, *per* Lord Ellenborough.

CHAPTER XI.

STATUTE OF FRAUDS ; WRITTEN COMPLIANCE.

III. It remains, in the present chapter, to treat of written compliance with the Statute of Frauds, so far as concerns sale contracts. The important exception under consideration, which receives much attention from the courts of England and America, reads in 29 Car. II. as follows: "That some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto duly authorized."¹ But in some of the United States the requirement runs, that "a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby."²

At the threshold we may observe, that, while oral compliance rests upon some decisive act of the buyer in which the seller has concurred, the written compliance we are now to consider necessitates an act, not by both parties, nor by either buyer or seller in particular, but simply by the party against whom an enforcement of the oral contract is sought. If this party alone be shown to have made and signed the requisite writing, the bargain will hold, even though the enforcing party had not committed himself to paper at all. Sometimes it is the buyer who is thus charged, and sometimes the seller: the seller's mere memorandum cannot be produced to enforce the bargain against the buyer, nor the buyer's

¹ 29 Car. II., c. 3, § 17; *supra*, p. 444.

² See statutes of New York, California, and Wisconsin; Browne Stat. Frauds, 3d ed. appx.

memorandum as against the seller. Mutual concurrence, therefore, such as part acceptance and receipt or part payment must imply; becomes, with reference to written compliance, of no consequence; the writing, whenever given, so it be given seasonably to sue upon, binds the maker and signer to the bargain. It follows that the enactment against frauds does not treat the written memorandum as the real contract of sale, nor as any contract at all; for, should the parties go through the formalities of a written contract of sale, that contract, unaided by a memorandum, would afford of itself quite a sufficient assurance against fraud and perjury: but its intent is, that some memorandum, made contemporaneous with or subsequent to the oral contract whose enforcement is sought, shall, in all sale transactions involving a considerable amount of money, be capable of production against the party who means to evade the bargain, and has rendered no conclusive oral fulfilment thereof; which memorandum upon its face shows that the bargain existed in his own contemplation.¹ And in the oral bargain itself, and that writing which takes the case out of the statute as to the party making and signing it, we have two distinct things which should not be confounded.²

The method of interpreting a note or memorandum which serves for written compliance follows the leading rules as to evidence in writing; the Statute of Frauds not seeking to vary these rules, but meaning to leave the legal effect of the writing as at common law.³ Into the law of evidence we shall not enter, except as questions may incidentally arise. But the distinction we have just pointed out suggests that there is likewise a marked difference between proving a contract of

¹ Benj. Sales, bk. 1, pt. 2, c. 6; *Siewewright v. Archibald*, 17 Q. B. 103; *Parton v. Crofts*, 33 L. J. C. P. 189; 16 C. B. N. S. 11; *Davis v. Shields*, 26 Wend. 341; *Hoar, J.*, in *Lerned v. Wannemacher*, 9 Allen, 412; *Williams v. Tucker*, 47 Miss. 678; *Justice v. Lang*, 42 N. Y. 493.

² *Ib.*

³ Benj. Sales, bk. 1, pt. 2, c. 6; cases *infra*.

sale and proving compliance with the Statute of Frauds. Various questions must, in the latter case, arise as to the sufficiency of memoranda, their mutual connection, and their bearing upon the original oral contract of sale; whereas, were the original contract itself in writing, different memoranda, executed at subsequent times, to which both parties were not privy, could have no effect in varying its terms, but would merely evince or explain them.¹ A contract, to be binding, ought to be mutual in obligations, so that neither party could sue upon it without the other; but the statute memorandum comports with the theory that one may enforce an oral bargain against the other, though it could not have been enforced against himself.

With these preliminary remarks, we proceed to consider the statute exception of written compliance, under these heads, — (1st) the written note or memorandum to be made; (2d) what it should contain; (3d) how and by whom it should be signed; (4th) compliance by means of agents.

(1st.) As to the written note or memorandum. The statute requires no formal written agreement of the parties; but simply, on the part of him who is to be charged, a writing which consistently imports a sale contract. Waiving, for the present, the proper contents of such a writing, we may observe as to form, that it may be expressed by letter, acknowledgment of invoice or bill of parcels, or telegram, besides the more formal memorandum; that it may be gathered from various writings, which have the intelligent and consistent purpose running through them; that it may even consist of the defendant's written proposal, if supplemented by parol proof of acceptance by the plaintiff; and that the writing need not have been intended as a memorandum by the defendant, nor actually addressed to the plaintiff.² Additional forms of writ-

¹ See Patteson, J., in *Sievwright v. Archibald*, 17 Q. B. 103.

² Browne Stat. Frauds, §§ 345-351, 354; Benj. Sales, bk. 1, pt. 2, c. 6, §§ 1, 2; cases *infra*.

ten memorandum under the statute, as by an auctioneer's or broker's entry, or bought and sold notes, will be studied in their proper place.¹

Of written compliance by letter there are numerous instances ; and the uniform doctrine of England and the United States, that the party to be charged is the only one who needs sign, renders this, especially as between bargaining parties who live at a distance from one another, the most convenient method for drawing buyer or seller into a position where the law will hold him.² So proof of sending a telegram, and a letter of acceptance by mail besides, as it is held, sufficiently complies with the statute ; and so would it be, we suppose, with the sending of a telegram alone.³ The buyer's written acknowledgment of a seller's invoice or bill of parcels may, together with such instrument, constitute a suitable memorandum, if given pursuant to a bargain ;⁴ but not where the so-called invoice appears to have been forwarded as a mere circular to induce a sale, and the buyer's acknowledgment was merely of its receipt as such, without evincing that any bargain was close.⁵ A memorandum made and signed by one party is available to the other, even though it state the bargain after the form of a mutual agreement,⁶ or be drawn up in duplicate, one copy only being signed by the buyer, and the other by the seller.⁷

So, too, the note or memorandum which the statute contemplates may consist of several writings, physically apart,

¹ *Infra*, compliance by agents.

² See *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Gibson v. Holland*, L. R. 1 C. P. 1.

³ *Trevor v. Wood*, 36 N. Y. 307. But as to the requirement of "signing," applied to telegrams, see *post*.

⁴ *Saunderson v. Jackson*, 2 B. & P. 238; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Buxton v. Rust*, L. R. 7 Ex. 1; s. c. L. R. 7 Ex. 279.

⁵ *M'Lean v. Nicoll*, 7 Jur. n. s. 999.

⁶ *Justice v. Lang*, 42 N. Y. 493.

⁷ *Lerned v. Wannemacher*, 9 Allen, 412.

which are logically connected, so long as they have unity of purpose in evincing the bargain, require nothing parol to connect them together, and are consistent with one another. For, as Lord Westbury has said, "In order to embody in the letter any other document or memorandum, or instrument in writing so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference, the writing itself becomes part of the instrument."¹ But, where two or more papers are thus taken together, the import of all must be, not a mere negotiation, but a concluded bargain.²

A written proposal, signed by the party to be charged, and accepted by parol by the party to whom it is made, is a sufficient memorandum to satisfy the statute.³ With the one-sidedness of such a doctrine legislation is not concerned, since all it seeks is ground to justify enforcing a bargain which was mutually entered into. No violence is done thereby to the policy of our legislation; because, as Willes, J., has said, no one can enforce his remedies in a case of this sort, without proving that he did or was ready to do his part to entitle him to performance as to the other party.⁴ And the only limitation to be noted is, that the writing in question should manifest a genuine offer which the other party had a right to accept.⁵

¹ *Peek v. North Staffordshire R. R. Co.*, 10 H. L. Cas. 472. And see *Schneider v. Norris*, 2 M. & S. 286; *Benj. Sales*, bk. 1, pt. 2, c. 6, § 1; *Browne Stat. Frauds*, §§ 350-353; *Caton v. Caton*, L. R. 2 H. L. Cas. 127; *Story Sales*, § 272; *Hinde v. Whitehouse*, 7 East, 558; *Lerned v. Wannemacher*, 9 Allen, 412.

² *Story Sales*, § 272; *M'Lean v. Nicoll*, 7 Jur. n. s. 999.

³ *Reuss v. Picksley*, L. R. 1 Ex. 342; *Himrod Furnace Co. v. Cleveland, &c. R. R. Co.*, 22 Ohio St. 451; *Sanborn v. Flagler*, 9 Allen, 474, *per* Bigelow, C. J.

⁴ *Reuss v. Picksley*, L. R. 1 Ex. 342.

⁵ See *Himrod Furnace Co. v. Cleveland, &c. R. R. Co.*, 22 Ohio St. 451.

That the writing which renders the bargain enforceable need not have been intended by the defendant as a statute memorandum is a plain inference from the decided cases, which constantly show that the party sued, so far from drawing up a memorandum for the purpose of establishing the oral contract, was unwittingly led into making such written recognition of the bargain as enabled the other to hold him to it ; and, with such clear proof of a bargain actually entered into, it would promote fraud, instead of checking it, for the courts to rule otherwise. In making the oral contract of sale enforceable under circumstances which establish such admission or recognition on the part of a defendant, the latest cases side strongly with the plaintiff who seeks a remedy, — more so than formerly.¹

Nor is the note or memorandum which the statute requires addressed, of necessity, to the enforcing party or his agent ; though this would be usual ; but a third person may be its recipient. *Gibson v. Holland*, decided in 1865, is the leading case on this point, wherein it was ruled (upon the analogy of chancery precedents) that a note or letter addressed by the seller to his own agent, which contained directions to carry the agreement into execution, was sufficient to render the contract enforceable against him.²

As the whole memorandum may be of subsequent date to the oral bargain, so, too, the several papers which sometimes constitute a memorandum need not all be contemporaneous. "The memorandum," says Hoar, J., "may be supplied by documents and letters written at various times, if they all

¹ Cf. *Bailey v. Sweeting*, 9 C. B. N. s. 843, *Story Sales*, § 272, *Wilkinson v. Evans*, L. R. 1 C. P. 407, *Buxton v. Rust*, L. R. 7 Ex. 1, 279, *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140, with *Richards v. Porter*, 6 B. & C. 437 (1827), and *Smith v. Surman*, 9 B. & C. 561 (1829). And see *Ellis v. Deadman*, 4 Bibb, 467; *Justice v. Lang*, 42 N. Y. 493.

² *Gibson v. Holland*, L. R. 1 C. P. 1, citing *Sugd. Vend. & P.* 14th Eng. ed. 139, § 39.

appear to have relation to it, and if coupled together they contain by statement or reference all the essential parts of the bargain.”¹ Any paper or papers which constitute a statute memorandum will suffice, if procured before the party sues to enforce the oral contract, so far as the point of time is concerned; but, after the action has been brought, it is too late, according to the old rules of practice, to supply what has not already been obtained.²

Where the memorandum is to be supplied by separate written papers, they must be connected, either physically, or by such reference from one to the other as to show a mutual relation, and make their contents, without the aid of parol evidence of the intention to so connect, a consistent compliance with the statute.³ But of the admissibility of parol evidence to explain the contents we shall speak hereafter. There might be several papers thus connected, any one of which would fully answer the purpose of a memorandum.⁴ Oral evidence, too, is often admissible for the purpose of identifying another document which is referred to, but not sufficiently described, in the memorandum.⁵ But, whether the memorandum be made out from one or several papers, the import should be a concluded bargain, not that a negotiation is merely progressing; and whatever stops short of this will fail to take the case out of the statute.⁶ What is more still, a paper drawn up and signed, but retained by the signer and never delivered to any one, would not appear to be binding upon him; since to construe this into a statute memorandum

¹ Hoar, J., in *Lerned v. Wannemacher*, 9 Allen, 412.

² *Bill v. Bament*, 9 M. & W. 36. See *supra*, p. 449.

³ *Benj. Sales*, bk. 1, pt. 2, c. 6; *Hinde v. Whitehouse*, 7 East, 558; *Peek v. North Staffordshire R. R. Co.*, 10 H. L. Cas. 473; *Lerned v. Wannemacher*, 9 Allen, 417; *Johnson v. Buck*, 6 Vroom, 344; *Story Sales*, § 272; *Browne Stat. Frauds*, § 350; *Smith v. Stanton*, 15 Vt. 685.

⁴ *Johnson v. Dodgson*, 2 M. & W. 653.

⁵ *Ridgway v. Wharton*, 6 H. L. Cas. 238.

⁶ See *Story Sales*, § 272.

would be too much like making a case out of a man's unuttered thoughts.¹

(2d.) As to what the written note or memorandum should contain. The legislature has said that there should be a written note or memorandum "of the said bargain;" and hence our purpose is to ascertain what will be a sufficient memorandum of the bargain under the statute. The identical parties to the sale should appear in the memorandum; also the essential terms and subject-matter of the oral contract; though, as between essential and non-essential matters of description to be embraced in the writing, the cases leave much room for dispute.

The memorandum should show for a certainty who is seller, and who is buyer; in other words, it must identify the contracting parties. The party chargeable is, of course, made manifest because of his signature; but who the other party is must also be shown in the writing, otherwise the writing is no statute memorandum of the bargain;² and the mere mention of names is insufficient, unless the memorandum enables the court besides to distinguish buyer from seller.³ There is an English case, decided upon a peculiar state of facts, which goes so far, apparently, as to require not only that the seller's name should be mentioned in a memorandum made by the buyer, but mentioned or made clear in the capacity of seller; treating a note as insufficient which mentioned that A., the buyer, agrees to buy a lot of goods "purchased by B." But this reference to B. (who was, in fact, the other contracting party) was not to B. distinctly as seller, but merely as a party who had once purchased the lot, and hence the memorandum

¹ See *Grant v. Levan*, 4 Barr, 393, a case of real estate.

² *Benj. Sales*, bk. 1, pt. 2, c. 6, § 1; *Allen v. Bennett*, 3 Taunt. 169; *Champion v. Plummer*, 3 B. & P. 252; *Bailey v. Ogden*, 3 Johns. 399; *Sanborn v. Flagler*, 9 Allen, 476; *Harvey v. Stevens*, 43 Vt. 653; *Calkins v. Falk*, 1 Abb. N. Y. App. 291.

³ See *Bailey v. Ogden*, *supra*.

proved an identification rather of subject-matter than of contracting parties; and, though the court may have appeared finical in passing upon the facts without drawing a larger inference, the case was not an exceptional one in principle.¹ Later and earlier cases are to be found, at first sight conflicting with this decision, in which the brief entry afforded by mercantile books, aided by slight oral evidence bearing upon the significance of book-keeping expressions and the collocation of words, has been received as a sufficient designation of the parties named in the mutual relation of seller and buyer; though the words unexplained, taken apart from the books, might not have established it.² As, for example, in a case where the reference to A., the buyer, was thus made by B., the seller: "N. 32 sacks cutlasses @ 39s., 280lbs. to await orders. (Signed) B."³ It was well said in a Massachusetts case, that the seller's memorandum need not *say* who is purchaser; for a "stipulation to deliver merchandise to a person clearly indicates that he is the purchaser."⁴ The principle to be gathered from the accumulated decisions appears to be, that the buyer and seller must, upon reference to the memorandum, be distinguishable as bearing that mutual relation, each being indicated in his own capacity; but that resort may be had, not to mere literal expressions alone, but likewise to the context and the general character of the writing. If the writing describes the parties so as to show that A. is the buyer, and B. the seller, the identity of A. or of B. as being the party intended by the written description is, of course, always open to oral proof; for this would be, as in other cases

¹ *Vandenburgh v. Spooner*, L. R. 1 Ex. 316.

² See *Sarl v. Bourdillon*, 1 C. B. N. s. 188; *Newell v. Radford*, L. R. 3 C. P. 52; *Sanborn v. Flagler*, 9 Allen, 474; *Coddington v. Goddard*, 16 Gray, 436; *Salmon Falls Man. Co. v. Goddard*, 14 How. 446; *Harvey v. Stevens*, 43 Vt. 653.

³ *Newell v. Radford*, *ib.*

⁴ *Sanborn v. Flagler*, 9 Allen, 474.

of written instruments, simply to apply the document to the subject-matter in controversy.¹

The memorandum should further show the subject-matter and essential terms of the oral contract of sale. But what are the essential terms of a bargain? In applying different sections of the Statute of Frauds, the courts have been led into distinguishing between the writing which under the present section must show the "bargain," and that which under the fourth section, quite similarly expressed (as to charging one with the debt of another), evinces an "agreement" of the parties. *Wain v. Warlters* — a case decided in 1804, which turned upon a construction of the other (or 4th) section of the statute — promulgated the rule, that the memorandum should set forth the "consideration" moving to as well as the promise made by the party to be charged.² But this principle would hardly apply with the same strictness to "bargains" under the 17th section, so as to render an expression of the "price" indispensable to the sufficiency of the memorandum; for we have seen that price is often implied in a contract of sale as something reasonable, and not expressed.³ And the rule established for present guidance appears to be, that, if the oral contract of sale expressly fixed a specific price, that price must appear on the face of the memorandum or writings connected therewith, as an essential part of the bargain; but that if the parties fixed no price, as frequently happens, and stood upon the implied or reasonable price, the memorandum can afford to be silent in like manner; and that, while resort cannot be had to parol evidence for the purpose of supplying a fixed price to complete the memorandum, it can be had in order to show that there was a price fixed

¹ Benj. Sales, bk. 1, pt. 2, c. 6, § 2; *infra*, as to agents. But see *Calkins v. Falk*, 1 Abb. (N. Y.) App. 291, as to the effect of a complete misnomer of a contracting party.

² *Wain v. Warlters*, 5 East, 10; Story Sales, § 270 n.

³ *Supra*, p. 200.

which ought to have appeared in the memorandum to make it available as a means of enforcing the bargain.¹ So much, then, for "consideration," under the 17th section. As for any further adaptation of the rule of *Wain v. Warlters* to the extent of necessitating the written expression of all that the enforcing party to a "bargain" had orally promised, the two sections of the statute are still to be kept apart; for, as Cresswell, J., observed in *Sarl v. Bourdillon*, where objection was made, on the buyer's behalf, that the memorandum for the sale of candlesticks omitted a special stipulation orally made on the seller's part to attach shade-holders to them: "We do not feel obliged to yield to this argument. The memorandum states all that was to be done by the person charged." And, referring to preceding authorities, he added: "That is sufficient to satisfy the 17th section of the Statute of Frauds, though not to make a valid agreement in cases within the 4th section."²

But the more we incumber the simple "bargain" or contract of sale with special stipulations on the part of seller or buyer, the more does it grow to resemble a contract or "agreement," properly so called. The cases do not consistently maintain, as an inflexible rule, that the enforcing party's stipulations may be omitted from the memorandum; and too closely are the mutual obligations of seller and buyer interwoven to make this a safe precept to go by, save in what are decidedly special and unusual stipulations on either side. It is constantly said, on the other hand, that all the terms of the bargain, substantial, material, or essential (each of these adjectives being interchangeably used by the courts in the

¹ Benj. Sales, bk. 1, pt. 2, c. 6, § 2; *Acebal v. Levy*, 10 Bing. 376; *Hoadly v. McLaine*, 10 Bing. 582; *Elmore v. Kingscote*, 5 B. & C. 383; *Goodman v. Griffiths*, 1 H. & N. 574; *Ashcroft v. Morrin*, 4 M. & Gr. 450. See Story Sales, § 222; Browne Stat. Frauds, §§ 376, 387-408.

² *Sarl v. Bourdillon*, 1 C. B. n. s. 188. And see *Egerton v. Mathews*, 6 East, 307, *per* Lord Ellenborough.

present instance), must appear in the memorandum. Hence such omissions from the memorandum as a stipulated term of credit, a fixed date of performance, or a condition that the party defendant should first approve the quality, have, in the courts of this country, been held fatal to the instrument's sufficiency ; not, avowedly, because it was the stipulation of the sued instead of the suing party (which often happens to have been the case), but upon the ground that a substantial part of the bargain did not appear in the memorandum.¹ Even an express warranty of quality by the seller which was left out of the memorandum has been held to invalidate it ;² though it might be questioned, in the light of the latest decisions, whether such purely collateral representations of the suing party need be so strictly expressed in writing. The general idea which pervades the decisions is, that, while the memorandum need not show each particular incident of the bargain, nor implied terms, it must show all the main points of the particular contract of sale mutually agreed upon ; and as to brokers' entries, we shall find the rule quite a strict one with reference to material terms.³

Substance, and not form, is to be regarded in all such cases. The memorandum must not falsify by showing a bargain different in essence from that orally entered into ; it must not be made up of contradictory statements ; and it must, on the whole, import a bargain.⁴ Hence, the sufficiency of the memorandum being at issue, it is competent to show by parol

¹ *Davis v. Shields*, 26 Wend. 341 ; *Story Sales*, § 270 ; *Boardman v. Spooner*, 13 Allen, 353 ; *Buck v. Pickwell*, 27 Vt. 157 ; *Elfe v. Gadsden*, 2 Rich. 373 ; *Soles v. Hickman*, 20 Penn. St. 180 ; *O'Donnell v. Leeman*, 43 Me. 158.

² *Peltier v. Collins*, 3 Wend. 459.

³ *Pitts v. Beckett*, 13 M. & W. 743 ; *infra*, as to compliance by agents.

⁴ See *M'Lean v. Nicoll*, 7 Jur. n. s. 999 ; *Cooper v. Smith*, 15 East, 103 ; *Smith v. Surman*, 9 B. & C. 561 ; *Goodman v. Griffiths*, 1 H. & N. 574. But, *semble*, a slight variation on immaterial points from the oral contract will not vitiate the memorandum. *Williams v. Bacon*, 2 Gray, 387.

evidence whether or no the writing offered correctly states the material terms of the oral contract, though such evidence cannot be adduced to aid or vary those written terms.¹ And, with regard alike to the parties, the essential terms, the subject-matter of the bargain, and the fact that a sale is constituted, the prevailing tendency is to admit extraneous evidence of trade usage, in furtherance of the true meaning of the parties, wherever the memorandum furnishes a terse statement, such as is usual in mercantile contracts; this from favor to business-men, and out of a liberal disposition to uphold bargains evinced by what they would readily understand among themselves as in substance a perfect memorandum.² Even surrounding circumstances have been admitted in evidence for the purpose of identifying the subject-matter, explaining some technical expression contained in the memorandum, and in general for removing an ambiguity upon its face; as, for instance, to show that a \$5 price is a *pro rata* and not total price;³ that so many "barrels" means barrels of a special dimension;⁴ and so on; not thereby contradicting or varying the written terms, nor supplying substantial matters omitted from the memorandum. Subject to these qualifications, the general rule is, that the writing or writings resorted to as a memorandum must, in order to satisfy the statute, so substantially express the bargain as to enable the court to make out what it was, without resorting to parol evidence.⁵

It is sometimes asked, whether a writing which repudiates an oral bargain can be a sufficient memorandum of it. On

¹ Benj. Sales, bk. 1, pt. 2, c. 6; *Pitts v. Beckett*, 13 M. & W. 743; *Acebal v. Levy*, 10 Bing. 376; *Coddington v. Goddard*, 16 Gray, 436.

² *Salmon Falls Man. Co. v. Goddard*, 14 How. 446; *Newell v. Radford*, L. R. 3 C. P. 52; *Coddington v. Goddard*, 16 Gray, 436.

³ *Spicer v. Cooper*, 1 Q. B. 424.

⁴ *Miller v. Stevens*, 100 Mass. 518. And see *Macdonald v. Longbottom*, 1 E. & E. 977.

⁵ See Benj. Sales, bk. 1, pt. 2, c. 6; Story Sales, § 269; 2 Kent Com. 511.

this point the earlier and later cases appear to be at variance ; the former taking the negative, the latter the affirmative, side. In *Richards v. Porter*, an English case decided in 1827, Lord Tenterden ruled that a letter from the buyer to the seller of hops, which said, in substance, "I have received your invoice, but I insist upon it the hops have not been sent in time," was an insufficient memorandum under the statute, even though taken in connection with the invoice.¹ The idea entertained by the court seems to have been, that the written repudiation of a bargain cannot be said to import a bargain.² *Smith v. Surman*, which followed in 1829, presented some similar points ; the decision, however, turning upon an inconsistency in the letters which had passed between the parties, so as to leave the real terms of the bargain in dispute.³ *Archer v. Bayles*, decided in 1850, is a case where letters construed together were held not to constitute a memorandum ; for here was not only a distinct refusal on the buyer's part to take the things, but a repudiation for a cause which went to the essence of the contract ; the admission being, in effect, of no more than that the buyer had bought on some contract.⁴ But the current has since set in an opposite direction : for *Bailey v. Sweeting*, decided in 1861, permitted a letter to take the contract out of the statute, which in effect said, "I made a bargain with you for the purchase of chimney-glasses at the sum of 38*l.* 10*s.* 6*d.*, but I declined to have them because the carrier broke them."⁵ Still more emphatic was *Wilkinson v. Evans* in expressing the same doctrine. An invoice of cheese

¹ *Richards v. Porter*, 6 B. & C. 437.

² See, *e.g.*, *Goodman v. Griffiths*, 1 H. & N. 574.

³ *Smith v. Surman*, 9 B. & C. 561.

⁴ *Archer v. Bayles*, 5 Ex. 625.

⁵ *Bailey v. Sweeting*, 9 C. B. N. s. 843. Says Erle, C. J. : "Now, the first part of the letter is unquestionably a note or memorandum of the bargain. It contains the price and all the substance of the contract, and there could be no dispute that if it had stopped there, it would have been a good memorandum of the contract within the meaning of the statute."

and candles was sent to the buyer: the buyer returned the invoice to the seller, with a note on the back, saying, "The cheese came to day, but I did not take them in for they were badly crushed. So the candles and cheese is returned." The court treated the invoice and note as a sufficient memorandum.¹ Lastly comes *Buxton v. Rust*, but recently decided in England, to confirm the doctrine beyond a doubt; the seller this time becoming the bounden party defendant. A memorandum of the terms of the sale had been given by A. to B. for the purchase of wool. B. afterwards wrote A. that it was now twenty-eight days since they had contracted, and that he should consider the bargain off because of A.'s failure to complete his part of the contract. On A.'s asking for a copy of the memorandum, B. enclosed a copy thereof, saying, "I beg to enclose a copy of your letter." It was decided that B. had, by signing the letter and enclosing the copy to A., so recognized the contract on his part as to enable A. to sue upon the contract. For this was as much as to say, while repudiating the bargain, "We made a certain oral contract; and this memorandum copy which I enclose shows what we agreed upon." And the court rightly refused to give so narrow an interpretation to the seller's acts as to make it a mere affirmation that the buyer had given a memorandum which the seller did not mean should evince a recognition on his own part.²

The result of the English decisions, therefore, is to establish, as the present rule, that a writing, made and signed by the defendant, may alone, or in connection with other writings, furnish the requisite memorandum, although, in effect, amounting to a repudiation of the oral bargain and non-performance, provided it contains a distinct recognition that

¹ *Wilkinson v. Evans*, L. R. 1 C. P. 407 (1866).

² *Buxton v. Rust*, L. R. 7 Ex. 1; s. c. 7 Ex. (Ex. Ch.) 279. See Blackburn, J. (ib. Ex. Ch.); who assents to this view, correcting Blackb. Sales, 66, *contra*.

such bargain had been actually entered into. For, under such circumstances, it is in furtherance of justice to permit the oral contract to stand thus evinced, and then determine, by the ordinary tests, whether the defendant had proper reasons for repudiating ; and, in general, as to the legal consequences of the evinced bargain. The American courts do not appear to have passed upon the question.

Another interesting inquiry concerns the application of the statute rule where subsequent modifications of a bargain which stands evinced in writing as originally made are introduced. The validity of a memorandum will not be affected by the circumstance that the defendant had a right to super-add to the sale something resting upon an entirely separate agreement, which would not properly have been expressed until it had ripened into a sale ; and if he never, in fact, availed himself of this right, the original memorandum may well be silent on the subject.¹ And it is a general rule, that no verbal agreement between the parties to the writing, made before or at the time of completing it, is admissible to vary its terms : all such verbal agreements are merged in the writing.² Now, as to an oral agreement, subsequent to the written memorandum, the doctrine of Massachusetts and some other States appears to be, that the writing is not conclusive, but that any subsequent oral agreement may enlarge the time of performance, or vary other terms of the contract, or show its waiver and discharge altogether ;³ and this follows the common-law rule, which permits the oral variance of a written contract not under seal.⁴

But the better opinion at this day is, that a written memorandum which falls within the Statute of Frauds cannot be

¹ *Coddington v. Goddard*, 16 Gray, 436.

² See *Cummings v. Arnold*, 3 Met. 486.

³ *Cummings v. Arnold*, 3 Met. 486 ; *Stearns v. Hall*, 9 Cush. 31. And see *Richardson v. Cooper*, 25 Me. 450 ; *Browne Stat. Frauds*, §§ 409-428.

⁴ See *Denman, C. J.*, in *Goss v. Lord Nugent*, 5 B. & Ad. 65.

varied by any subsequent agreement which is not expressed in writing; and that parol evidence is inadmissible to show a change in the time or place of delivery, or other modification of the original bargain. Such is the doctrine of the late English cases, though the former tendency was otherwise.¹ Whether a complete abandonment and rescission of the contract might not appear by verbal testimony is as yet unsettled.² But it is decided in England, that, where the parties enter into a new oral agreement whose effect would be incidentally to rescind the previous written contract by essentially modifying its terms, the modification is inoperative as a rescission of the written contract, which may, therefore, be enforced.³

Even the so-called Massachusetts doctrine, which many regard as opposed to the foregoing, may not be (to take decisions rather than *dicta*) far different in this respect. It seems still to recognize that a party ought not to be allowed to sue partly on a written and partly on an oral agreement; and only adds, that, in defending an action on the written contract, the defendant may show that he has performed it according to an oral agreement for a substituted performance, or, being ready to do so, was prevented by the plaintiff's act.⁴ There is a recent decision of the English Queen's Bench which supports the first branch of the same exception. Here was a verbal order for goods to be sent from London to Rot-

¹ *Stead v. Dawber*, 10 Ad. & E. 57; *Marshall v. Lynn*, 6 M. & W. 109; *Noble v. Ward*, L. R. 1 Ex. 117; s. c. L. R. 2 Ex. 135; *contra*, *Cuff v. Penn*, 1 M. & S. 21. And see *Clifford, J.*, in *Swain v. Seamens*, 9 Wall. 272; *Dana v. Hancock*, 30 Vt. 616.

² See *Benj. Sales*, bk. 1, pt. 2, c. 6; *Browne Stat. Frauds*, §§ 409-428.

³ *Noble v. Ward*, L. R. 1 Ex. 117; s. c. app. L. R. 2 Ex. 135; *Moore v. Campbell*, 10 Ex. 323. As to mere forbearance, see *Ogle v. Earl Vane*, L. R. 2 Q. B. 275; s. c. L. R. 3 Q. B. 272. And see, as to interlineations, *Stewart v. Eddowes*, L. R. 9 C. P. 311.

⁴ See *Hoar, J.*, in *Whittier v. Dana*, 10 Allen, 326; explaining *Cummings v. Arnold*, 3 Met. 486; *Stearns v. Hall*, 9 Cush. 31.

terdam ; and on account of precautions, rendered necessary during a European war and a state of blockade, a different route from that orally given was chosen by the seller, who then sent an invoice with a letter stating the facts. The buyer, after receiving the letter, signified, by words or conduct amounting to a waiver, that he had no objection to the change of route. The ship containing the goods was stranded, and the goods were spoiled. At a later date the buyer wrote a letter which distinctly referred to the seller's letter, and clearly admitted what it stated ; but he added that the seller ought to have obtained his sanction to the change of route. This last letter was held to be a sufficient recognition by the buyer to take the contract out of the statute ; and in response to the argument that this letter gave no written assent to the substituted mode of delivery, and hence failed to assent to the substituted contract, the court responded, that the seller relied, not upon the substituted, but upon the original contract, and held that by acts and conduct the buyer had assented to the substituted delivery. "I cannot see," says Blackburn, J., "why the assent to a substituted mode of performing one of the terms of a contract need be in writing, and may not be by parol ; though the original contract must have been in writing. They are quite different things, the proof of a substituted contract, and the proof of a ratification or approval after performance, of the substituted mode of performance." ¹

(3d.) As to how and by whom the written memorandum should be signed. The party to be charged must in some part of the memorandum place his name, and this is usually at the foot ; though the requirement of "signing" is satisfied with a signature at the top or the bottom or in the body of

¹ *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140. Cockburn, C. J., here advances similar views to Blackburn, J.

the instrument.¹ But some States have altered the statute expression so as to require the writing to be "subscribed" instead of "signed;" the effect of which is to restrict one's authentication to writing his name at the end of the memorandum.² A mark is sufficient, or a signature by another, if *bona fide* and as the authorized signature to the memorandum of the party himself.³ Nor can it be reasonably doubted that the party may use a lead pencil instead of ink.⁴ Signature by initials is sufficient; parol evidence being admissible as to the party's identity.⁵

But, whether the signature of the defendant party or his agent be by full name or initials or by mark, and wherever the place of its insertion, the theory of the statute is that it must have been intended to denote a signature, and not merely to serve by way of personal description;⁶ and, where the name appears in an unusual place or after an unusual form, the intention of the party, in so putting it as a signature, becomes a material question of fact. Words of mere description—as the mother's subscription of a letter to her son, "Your affectionate mother"—are held not to satisfy the statute.⁷

There may be a signature by printing or stamping, so as to

¹ *Johnson v. Dodgson*, 2 M. & W. 653; *Allen v. Bennett*, 3 Taunt. 169; *Browne Stat. Frauds*, §§ 355, 358; *Story Sales*, § 266; *Benj. Sales*, bk. 1, pt. 2, c. 8; *Clason v. Bailey*, 14 Johns. 484; *Harvey v. Stevens*, 43 Vt. 653.

² See California and New York statutes, *Browne Stat. Frauds*, 3d ed. appx.; *Davis v. Shields*, 26 Wend. 341.

³ 2 Kent, 511; *Helshaw v. Langley*, 11 L. J. Ch. 17.

⁴ *Story Sales*, § 266; *Merritt v. Clason*, 12 Johns. 102; *Clason v. Bailey*, 14 Johns. 484; *Geary v. Physic*, 5 B. & C. 234; *Benj. Sales*, bk. 1, pt. 2, c. 6.

⁵ *Phillimore v. Barry*, 1 Camp. 513; *Caton v. Caton*, L. R. 2 H. L. 127, *per* Lord Westbury; *Barry v. Coombe*, 1 Pet. 640; *Story Sales*, § 266; *Benj. Sales*, bk. 1, pt. 2, c. 8.

⁶ *Benj. Sales*, bk. 1, pt. 2, c. 7.

⁷ *Selby v. Selby*, 3 Mer. 2.

fulfil the statute requirement, if the circumstances of the case be such as to give the printed or stamped name a significance beyond that of an unused blank, and equivalent, in fact, to a memorandum in actual use with the name as part of it. The case is not unlike that of writing one's name in blank to documents, to be filled up as emergency may require: invalid as a signature except as brought into use. *Schneider v. Morris* illustrates the rule, which at this day has become quite important. Here a bill of parcels printed with a blank for the purchaser's name was held to be sufficiently signed, after the seller had written in the name of a certain purchaser with his own hand, and made the instrument a bill of parcels as to that particular sale; and this notwithstanding the seller's name appeared only as part of the printed bill. By filling up the bill, the seller had, in effect, recognized his printed name as his own signature to the memorandum.¹ But Lord Ellenborough was further of the opinion that the printed signature would have been of doubtful sufficiency under the statute, had this case rested merely on the printed name, unrecognized by and not brought home to the party as having been printed by him or his authority, so that the printed name would have stood unappropriated to the particular contract.²

Since the written memorandum may be made up of two or more papers which bear a mutual relation, a signature which governs the whole by suitable reference may suffice, though actually placed only upon one of the papers; as in the case of a memorandum which is shown by a correspondence, or by the defendant's letter referring to an invoice or bill of parcels.³ A letter signed by the party to be charged has been deemed sufficient to embrace a copy of a memorandum

¹ *Schneider v. Norris*, 2 M. & S. 286. *Semble* that the invoice or bill of parcels would bind equally, though filled out by one's authorized agent. See *Hawkins v. Chace*, 19 Pick. 502.

² *Ib.* And see *Saunderson v. Jackson*, 2 B. & P. 238.

³ *Supra*, p. 516.

signed by the other party, which is enclosed and referred to, but not otherwise authenticated by the party who forwards it.¹ It would appear from the English decisions that the reference to connect two papers or two clauses so as to make one signature apply to both must be from what is signed to what is unsigned, and not the reverse.²

Subscription or signature by the party to be charged thereby is all that the statute requires; the effect being to leave the party who has not signed free to enforce the contract or not, as he may elect.³ And herein is seen quite clearly the effect of the section we are considering, both in making the oral contract of sale not a void but only an unenforceable contract, while its terms are not complied with, and in resting the bargain and its consequences finally upon the oral contract itself, and not upon the memorandum which evinces it.⁴

(4th.) As to compliance by means of agents. The 17th section expressly provides that the written memorandum may be made and signed, not only by the parties to be charged, but likewise by "their agents thereunto lawfully authorized;" and although, as enacted in some of the United States, the statute makes no especial mention of agents, precedent and reason both favor compliance by an agent as legally representing his principal.⁵

The law of agency controls this subject; and, while the party thus acting must be lawfully authorized, the statute does not insist upon an appointment in writing; nor need

¹ Buxton v. Rust, L. R. 7 Ex. 1, 279.

² Benj. Sales, bk. 1, pt. 2, c. 7, citing Caton v. Caton, L. R. 2 H. L. Cas. 127.

³ Allen v. Bennett, 3 Taunt. 169; Benj. Sales, bk. 1, pt. 2, c. 7; Justice v. Lang, 42 N. Y. 493; Browne Stat. Frauds, § 365; Story Sales, § 266.

⁴ See *supra*, p. 444.

⁵ Browne Stat. Frauds, 3d ed. appx.

the authority have been previously conferred, if the agent's act be subsequently ratified.¹ The authority may be specially conferred, but it is also deducible from the course of the agent's employment; and the latter method is especially marked in the case of brokers and auctioneers. If there be two sellers, the agent must be agent of both, or neither will be bound; and the same may be said of buyers.²

One whose employment is essentially on behalf of the seller will not readily be supposed to have authority to bind the buyer likewise by a written memorandum. Thus, where a person, employed as traveller or agent to solicit business, made a bargain with a certain party, and, at the latter's request, signed a memorandum on the buyer's book, it was held that the memorandum could not be used against the buyer.³ The evidence of agency for the buyer has been deemed insufficient, even though the seller's traveller wrote the order in duplicate, handing one copy to the buyer, and keeping the other; there being on the buyer's part no recognition of the traveller as his agent.⁴ "I think that it is extremely important," says Pollock, B., "in all those cases in which it is attempted to prove an implied agency, or that there is evidence from which an agency may be inferred, to take into account the character of the parties and their usual course of dealing. The act requires that the note of the bargain should be signed by an agent of the party to be charged. At first sight it would seem odd, that, where two contracting parties meet together, that one who is in a position somewhat adverse to the other should be his representative and agent. But no doubt such a thing may happen."⁵

¹ Story Sales, § 267; Benj. Sales, bk. 1, pt. 2, c. 8; Browne Stat. Frauds, §§ 367-370; Newton v. Bronson, 3 Kern. 587; Merritt v. Clason, 12 Johns. 102.

² Smith v. Neefus, 53 Barb. 63.

³ Graham v. Fretwell, 3 M. & Gr. 368; Graham v. Musson, 5 Bing. N. C. 603.

⁴ Murphy v. Boese, L. R. 10 Ex. 126 (1875). But cf. Durrell v. Evans, 1 H. & C. 174.

⁵ Pollock, B., in Murphy v. Boese, *supra*.

But the authority of an agent under the statute, as it need not appear in writing at all, is a matter of evidence, and may be established upon oral proof. Of its sufficiency a jury may be permitted to judge. Auctioneers and brokers, we shall presently see, are quite frequently empowered to bind both parties by a memorandum; and so may it be with others. In *Durrell v. Evans* it was decided upon appeal, reversing the decision of the lower court, that there was evidence to go to the jury of authority in the seller's factor to bind the buyer by a certain memorandum made at the time of sale, the buyer appearing to have shared in its preparation; though the case was a close one, as the conflicting opinions show. The factor, in whose presence the bargain was concluded by both parties, had given a "bought" memorandum to the buyer, tearing it from his book, and made a corresponding "sold" entry on the stub of the book.¹

As between the seller's agent and the seller, or the buyer's agent and the buyer, the authority which is given to make a contract of sale usually carries with it an authority to sign the statute memorandum for that purpose; and, after the agent has signed the memorandum in such a case, the principal cannot withdraw, though there might be exceptions where the agent's authority in this respect had been meanwhile revoked by his principal, and notice thereof brought home to the other party.² But the extent of the agent's powers in making the sale—as being limited or general—is often material to the issue;³ and, if a seller gives a special or personal authority to one to be his agent, that agent (though he be an auctioneer or broker) cannot delegate the authority, so as to empower his sub-agent to bind the seller by making the

¹ *Durrell v. Evans*, 6 H. & N. 660; 1 H. & C. 174. But cf. *Murphy v. Boese*, *supra*.

² See *Heyman v. Neale*, 2 Camp. 337; *Williams v. Bacon*, 2 Gray, 387.

³ See *Pitts v. Beckett*, 13 M. & W. 743; *Henderson v. Barnewall*, 1 Y. & J. 387; *Browne Stat. Frauds*, § 370; *Coddington v. Goddard*, 16 Gray, 436.

memorandum.¹ On the other hand, as the authority of an agent to sign the memorandum may be proved by parol, so the original authority to buy or sell need not be expressed in writing.² These are general principles of the law of agency, which the language of the Statute of Frauds does not contradict. So, too, is it a familiar doctrine of agency, that the subsequent adoption of an unauthorized act is as good as a previous authority.³

When the signature required by the statute is not placed upon the memorandum by the party himself against whom the contract is sought to be enforced, but a third party's writing is offered in its place, we are to ask, not only whether the third party was lawfully authorized, but whether he signed in the capacity of agent; for if the signature thus made was only as a witness to the writing, or to evidence a bargain made on his personal account, it will not answer.⁴ The agent may, however, not only express the principal's name, but may write his own name instead, for the purpose of binding the principal; parol evidence being always competent to show, when buyer or seller is sued, in what capacity the third party intended to sign.⁵ A signature made by an authorized agent is as valid, whether its position be at the head or at the foot or in the body of the memorandum, and whether written in lead pencil or ink, as would be that of the principal party himself.⁶

¹ *Henderson v. Barnewall*, 1 Y. & J. 387; *Peirce v. Corf*, L. R. 9 Q. B. 210, *per* Blackburn, J.

² *Soames v. Spencer*, 1 D. & R. 32; *Sanborn v. Flagler*, 9 Allen, 474; *Merritt v. Clason*, 12 Johns. 102.

³ *Maclean v. Dunn*, 4 Bing. 722; *Newton v. Bronson*, 3 Kern. 587.

⁴ *Gosbell v. Archer*, 2 Ad. & E. 500; *Benj. Sales*, bk. 1, pt. 2, c. 8; *Noakes v. Morey*, 30 Ind. 103.

⁵ *Trueman v. Loder*, 11 Ad. & E. 589; *Soames v. Spencer*, 1 D. & R. 32; *Kenworthy v. Schofield*, 2 B. & C. 945; *Sanborn v. Flagler*, 9 Allen, 474; *Williams v. Bacon*, 2 Gray, 387; *Story Sales*, § 267; *Baldwin v. Bank of Newbury*, 1 Wall. 234.

⁶ *Merritt v. Clason*, 12 Johns. 102; *supra*, pp. 529, 530.

With regard to telegraphic despatches, which have so lately revolutionized business, it would appear that the telegraph clerk or operator may sign the name of the sender of the message, with the same effect, in respect to taking the contract out of the statute, as a signature by any other lawfully authorized agent of the sender; and if, as is customary, the sender leaves his own draft message at the telegraph-office, all the more manifestly is there a sufficient memorandum.¹

But the agent of the party to be charged cannot be the charging party himself for the purposes of the statute, but is necessarily some third person; and where the plaintiff had made a memorandum of the bargain in writing, the defendant looking over him as he wrote, and suggesting an alteration of figures, it was held that the plaintiff could not be treated as the defendant's agent.² So, too, the memorandum of one who signed as agent for an undisclosed principal, — there being, in point of fact, no principal in the transaction, — was not permitted to enforce the bargain upon this writing.³ An agent who has contracted in his own name will not be permitted to contradict the writing for the purpose of showing that he meant to bind his principal, and not himself. No doubt it may be shown that one or both of the contracting parties acted on behalf of others, so as to give the benefit of the contract, on the one hand, to unnamed principals, or charge them, on the other hand, under the Statute of Frauds. "It does not deny," says Parke, B., "that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in requiring the agreement, in pursuance of his authority, is in law the act of the principal." "But, on the other hand," he adds, "to

¹ Godwin v. Francis, L. R. 5 C. P. 295; Trevor v. Wood, 36 N. Y. 307.

² Wright v. Dannah, 2 Camp. 203; Farebrother v. Simmons, 5 B. & A. 333; Sharman v. Brandt, L. R. 6 Q. B. 720.

³ Sharman v. Brandt, *supra*.

allow evidence to be given, that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done.”¹ A memorandum which is drawn up by a third party in terms essentially different from what the principal parties authorized him to state cannot be afterwards used against a party who does not adopt the modifications ;² and one who signs a memorandum, either as agent for a non-existing principal, or nominally on behalf of one who never authorized him to act, will be personally bound.³

Written compliance with the statute by means of agents is most commonly afforded by auctioneers and brokers, — two classes of persons whose ordinary employment places them in such connection with buyer and seller as to enable them constantly to make a memorandum of sale which shall be efficacious on either side.

An auctioneer’s authority to bind the buyer as well as the seller is founded in the method of conducting a public sale ; namely, by knocking down the article to the highest bidder, and making a memorandum on the spot.⁴ But it is only when the hammer falls that he becomes agent for the buyer ; up to which time he continued the agent of the seller exclusively. Nor does his agency to sign for the buyer extend beyond the time of the sale ; and, unless he made a good and sufficient memorandum on that occasion, he cannot hold the buyer without the latter’s distinct authority for making a subsequent writing. In fact, while he is the seller’s agent

¹ *Higgins v. Senior*, 8 M. & W. 834.

² *Pitts v. Beckett*, 13 M. & W. 743.

³ See *Kelner v. Baxter*, L. R. 2 C. P. 174 ; *Benj. Sales*, bk. 1, pt. 2, c. 6, § 2.

⁴ *Hinde v. Whitehouse*, 7 East, 558 ; *Emmerson v. Heelis*, 2 Taunt. 38 ; *infra*, auction sales ; *Benj. Sales*, bk. 1, pt. 2, c. 8 ; *Johnson v. Buck*, 6 Vroom, 338 ; *Burke v. Haley*, 2 Gilm. 614.

throughout, by virtue of his employment, he is the buyer's only for a memorandum made contemporaneous with the acceptance of his bid.¹ So, too, may the auctioneer's conduct be such as to repel the inference that the transaction made him the buyer's agent for satisfying the statute; as where the auctioneer makes a private sale of the articles, or puts them up at auction for settling the price at which the purchaser is to take them under a bargain already made.² The memorandum may be made on the spot by the auctioneer's clerk, as well as by the auctioneer personally,³ unless the circumstances of the case forbid it.⁴ The statutes of some States, we may add, expressly provide that the auctioneer's memorandum-book shall be deemed a note of the contract of sale.⁵

In pursuance of this rule, it has been held that where an auctioneer or his clerk enters in a suitable auction-sale book, as fast as the bids are accepted, the article sold, the name of the buyer, and the prices at which he purchases, the memorandum satisfies the statute, and renders the contract of sale enforceable against the bidder.⁶ But an auction sale upon conditions, or essential stipulations, requires a memorandum stating those conditions or stipulations, or else referring distinctly to the paper which contains them; and where an auctioneer at a sale of horses sold a horse subject to conditions set forth in the catalogue, and neither affixed the catalogue nor expressed the conditions, nor made reference

¹ *Mews v. Carr*, 1 H. & N. 484, *per* Pollock, C. B.; *Horton v. McCarty*, 53 Me. 394.

² *Mews v. Carr*, 1 H. & N. 484; *Bartlett v. Purnell*, 4 Ad. & E. 792.

³ *Bird v. Boulter*, 4 B. & A. 443; *Cathcart v. Keirnaghan*, 5 Strobh. 129; *Alna v. Plummer*, 4 Me. 258; *Johnson v. Buck*, 6 Vroom, 338; *Harvey v. Stevens*, 43 Vt. 653.

⁴ *Peirce v. Corf*, L. R. 9 Q. B. 210. And see *Henderson v. Barnewall*, 1 Y. & J. 387.

⁵ See statutes of New York, California, Michigan, and Wisconsin; *Browne Stat. Frauds*, 3d ed. appx.

⁶ See *Harvey v. Stevens*, 43 Vt. 653.

thereto, in entering the note of sale upon his sales ledger, it was held that the buyer could take advantage of the Statute of Frauds, as there was no sufficient written memorandum of the sale.¹

The theory upon which the auctioneer's sale memorandum is accepted as a satisfaction of the statute appears to be, that the entry was part of the auction transaction, and the memorandum so openly made in the usual course of business, that the bidder, if not actually inspecting the record, might have done so. Stealthy entries made by an auctioneer or his clerk, entirely apart from the buyer and upon a strictly private book, are not so obviously the memorandum of the buyer's duly authorized agent, in any just sense.²

The occupation of brokers has not been quite so distinctly defined in this respect as that of auctioneers. But a broker is one who negotiates mercantile and other contracts between parties ; and, properly speaking, he is a mere negotiator in a certain line of transactions, though sometimes in the special employ of one party. Brokers, so far as their business brings them into mutual relation with buyer and seller, are agents for both parties, duly empowered by virtue of their employment to make a sufficient memorandum which shall bind each principal.³

But there are cases in which a broker has been treated as broker for one party, and not for the other ;⁴ and, in some respects, local usage must still influence the extent of their

¹ *Peirce v. Corf*, L. R. 9 Q. B. 210. And see *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, 7 East, 558; *Norris v. Blair*, 39 Ind. 90; *Morton v. Dean*, 13 Met. 385; *Coles v. Bowne*, 10 Paige, 526.

² See *Blackburn, J.*, in *Peirce v. Corf*, *supra*. See, further, *Baltzen v. Nicolay*, 53 N. Y. 467; sales at auction, *post*, c. 18.

³ See *Bigelow, C. J.*, in *Coddington v. Goddard*, 16 Gray, 442; *Story Agency*, § 28; *Benj. Sales*, bk. 1, pt. 2, c. 8; *Brett, J.*, in *Fowler v. Hollins*, L. R. 7 Q. B. 616; *Heyman v. Neale*, 2 Camp. 337; *Hinckley v. Arey*, 27 Me. 362; *Clason v. Bailey*, 14 Johns. 484.

⁴ *Moore v. Campbell*, 10 Ex. 323; *Davis v. Shields*, 26 Wend. 341.

rights and liabilities. Thus, brokers in most parts of the United States keep a memorandum-book, and make entries of each sale transaction therein, using brief expressions; and these entries, however concise, if not at material variance with the oral contract, nor making material omissions, are quite favorably regarded.¹ In England, however, until 1870, there were statutes, particularly with reference to brokers in London, which required each broker not only to give bond and keep a memorandum-book, but to deliver, upon request, a contract note to both buyer and seller; and upon rules and regulations, thus made imperative, have most of the decisions in that country turned.² As between these contract notes, and the memorandum-book kept by the broker for evincing a contract under the statute, there has been much difference of opinion at different periods in the English courts; and in the same connection have arisen numerous disputes as to the legal effect of "bought and sold notes," with which the contract notes may or may not be properly classed, but which, at all events, were of various kinds, and, instead of professing to be an exact transcript of the broker's memorandum, were rather corresponding written expressions of the bargain, in most cases, to suit the convenience of the respective parties, one beginning "Bought," and the other "Sold."³ The real terms of the bargain were manifest, if the bought and sold notes or contract notes and broker's memorandum all corresponded; but where the notes differed essentially from one another, or from the memorandum, the legal effect of the variance occasioned much controversy.⁴

¹ See Story Sales, § 267; *Coddington v. Goddard*, 16 Gray, 436; *Hinckley v. Arey*, 27 Me. 362; *Boardman v. Spooner*, 13 Allen, 353; *Clason v. Bailey*, 14 Johns. 484.

² Benj. Sales, bk. 1, pt. 2, c. 8; Blackb. Sales, 98.

³ See Benj. Sales, bk. 1, pt. 2, c. 8.

⁴ Mr. Benjamin submits the following propositions as deducible, on the whole, from the English authorities; admitting, however, that some of the points are not finally settled. *Firstly*. The broker's signed entry

The practice of giving bought and sold notes does not seem to greatly prevail in this country; and as the means of

in his book constitutes the contract between the parties, and is binding on both. *Heyman v. Neale*, 2 Camp. 337; *Thornton v. Charles*, 9 M. & W. 802; *Sievwright v. Archibald*, 17 Q. B. 115. *Secondly*. The bought and sold notes do not constitute the contract. *Thornton v. Charles*, and *Sievwright v. Archibald*, *supra*. *Thirdly*. But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute, even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry. *Sievwright v. Archibald*, 17 Q. B. 115. *Fourthly*. Either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book. *Parton v. Crofts*, 16 C. B. N. s. 11. *Fifthly*. Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance. *Hawes v. Forster*, 1 Moo. & Rob. 368; *Parton v. Crofts*, *supra*. *Sixthly*. As to *variance*: This may occur between the bought and sold notes where there is a signed entry, or where there is none. It may also occur when the bought and sold notes correspond, but the signed entry differs from them. If there be a signed entry, this entry will, in general, control the case, because it constitutes the contract of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury, whether the acceptance by the parties of the bought and sold notes constitutes evidence of a *new* contract modifying that which was entered in the book. *Thornton v. Charles*, 9 M. & W. 802, explaining *Hawes v. Forster*, *supra*; *Sievwright v. Archibald*, 17 Q. B. 115. And see first proposition stated, *supra*. *Seventhly*. If the bargain is made by correspondence, and there is a variance between the agreement thus concluded and the bought and sold notes, the principles are the same as govern variance between a signed entry and the bought and sold notes. *Heyworth v. Knight*, 17 C. B. N. s. 298. *Eighthly*. If the bought and sold notes vary, and there is no signed entry in the broker's book, nor other writing showing the terms of the bargain, there is no valid contract. *Thornton v. Kempster*, 5 Taunt. 786; *Gregson v. Rucks*, 4 Q. B. 747; *Sievwright v. Archibald*, *supra*. *Ninthly*. If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the seller, evidence of usage is admissible to show that the seller is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the

evinced a bargain in writing under the statute, apart from a broker's memorandum, or some other writing which speaks for itself and satisfies all requirements, it thus far receives with us little favor.¹ But whether it be for the want of a proven contract, or of some sufficient memorandum thereof, bought and sold notes which differ materially are quite unavailable; and certainly, the fewer the writings which serve as memorandum evidence of a bargain, the less likely is the oral contract to fail of enforcement because of their material discrepancies.²

Where a broker purchased hemp for B., signing as broker a contract note as follows: "Bought for B. of our principals 200 tons of hemp," and it appeared that the broker had no principal (of which fact B., however, was not informed), it was held that the broker could not sue B. upon such a written memorandum, either because (1) the contract was not intentionally made with the broker as a principal party, or because (2) the broker, if one of the contracting parties, could not sign as the binding agent of B., the other party.³

Before leaving this subject of the Statute of Frauds, we may observe that while sales of personal property are pecu-

suency of the purchaser, and to withdraw if he disapproves. *Hodgson v. Davies*, 2 Camp. 531; *Cropper v. Cook*, L. R. 3 C. P. 194. And Mr. Benjamin adds, that a mere difference in the language of the bought and sold notes will constitute no variance, if the meaning, aided by evidence of mercantile usage, can be shown to be the same, and the two instruments are found to correspond in substance. *Benj. Sales*, bk. 1, pt. 2, c. 8; *Bold v. Rayner*, 1 M. & W. 342; *Kempson v. Boyle*, 3 H. & C. 763. And see *Maclean v. Dunn*, 4 Bing. 722.

¹ See *Coddington v. Goddard*, 16 Gray, 436; *Butler v. Thomson*, 11 Blatch. 533; *Davis v. Shields*, 26 Wend. 341.

² *Suydam v. Clark*, 2 Sandf. 133.

³ *Sharman v. Brandt*, L. R. 6 Q. B. (Ex. Ch.) 720. And as to a broker's personal right and liability in similar cases, see *Humfrey v. Dale*, 7 E. & B. 266; *Fleet v. Murton*, L. R. 7 Q. B. 127; *Mollett v. Robinson*, L. R. 5 C. P. 648; L. R. 7 C. P. 84.

liarly affected by the 17th section, to which our attention has been confined, they sometimes fall within other provisions of the act. The 4th section brings certain other cases of contract, which at common law could be validly made by oral agreement, under a like requirement as concerns a memorandum to be "in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."¹ Among the cases therein enumerated are those of a collateral undertaking by one party for another, and of an agreement which is not to be performed within a year. Precedents of written memoranda under the 4th section, though sometimes adduced under the 17th, are unsafe to go by; for, as we have shown, the courts incline to distinguish between the written memorandum of an "agreement" and that of a "bargain."² But a sale case will sometimes involve the construction of the 4th section. Thus, where F. sold goods on credit to H., who soon after sold the same goods with others to a third party, upon the understanding that the latter would in consideration of the sale pay the debt of H. to F., it was held that the sale was a good and sufficient consideration for the promise, that it was not such a collateral undertaking as the statute requires to be expressed in writing, and that F. might sue thereon in his own name.³

¹ 29 Car. II., c. 23, § 4.

² *Supra*, pp. 467, 521.

³ *Flanagan v. Hutchinson*, 47 Mis. 237. And see auction sales, *infra*, c. 18.

CHAPTER XII.

SELLER'S REMEDIES BY PERSONAL ACTION.

WHEN a contract of sale is broken by either party, the question becomes, as to the other, one of remedy. Let us, for the present, consider the seller's remedies in case of the buyer's breach; reserving the buyer's remedies under the reverse state of things for a future chapter. The seller's remedies may be of two kinds: I. By personal action against the buyer. II. By proceedings against the goods.

I. The present chapter relates to personal actions against the buyer. And here, as elsewhere, in dealing with remedies, it is important to distinguish between cases (1st) where the property transfer has not fully taken place, and (2d) where such transfer has fully taken place.

(1st.) Where the property transfer has not fully taken place, and the property and possession of the goods remain still in the seller, so that he can suffer no loss of identical subject-matter, his remedy becomes reduced to a question of damage sustained in consequence of the buyer's delinquency.¹ For though, theoretically speaking, equity might perhaps be invoked to enforce specific performance of the contract, this course seems never to be taken by a seller in practice; and most probably because damages at law will afford him an adequate compensation.² The damage which the seller actually sustains under these circumstances, and that for

¹ Benj. Sales, bk. 5, pt. 1, c. 1, § 1; Story Sales, §§ 433, 438.

² See 2 Kent, 487; Kindersley, V. C., in *Falcke v. Gray*, 4 Drew. 658.

which the law will compensate him, is, in general, the difference between the contract price and the market price of the goods at the time and place of breach; for since the seller may at once sell the goods to another and get the current price, if he does not elect to keep them to himself, this measures his real loss on the broken contract with substantial accuracy. The rule is constantly applied in the courts of Great Britain and the United States.¹

The fundamental principle here involved is, as in all analogous cases where damages are to be computed, that the injured party shall be indemnified for whatever loss follows immediately and necessarily as the consequence of the delinquent party's misconduct, according to the spirit and intent of the contract; no more and no less. To apply the principle with exact uniformity would be impossible. "I think," says Cockburn, C. J., "that the nearest approach to any thing like a fixed rule is this: That to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract."² Hence is it that the seller's damages for non-acceptance of the goods and non-payment of price may embrace additional items. Thus the reasonable costs and charges incidental to reselling in the market should always be reimbursed as part of the seller's damages.³ So should the charges and costs which properly accompanied the seller's demand for his price under the original bargain. The manufacture of goods to order, too, may involve the seller in special losses as a direct consequence of the

¹ *Barrow v. Arnand*, 8 Q. B. 604; *Story Sales*, §§ 314, 435, 436; *Hobbs v. London, &c. R. R. Co.*, L. R. 10 Q. B. 111; *McNaught v. Dodson*, 49 Ill. 446; *Haines v. Tucker*, 50 N. H. 307; *Allen v. Jarvis*, 20 Conn. 38; *Bement v. Smith*, 15 Wend. 493; *Chapman v. Ingram*, 30 Wis. 290; *Northrup v. Cook*, 39 Mis. 202.

² *Hobbs v. London, &c. R. R. Co.*, L. R. 10 Q. B. 111.

³ *Story Sales*, § 436.

buyer's refusal to abide by the contract. Where, for instance, one had contracted for a large quantity of leather hose of a certain pattern and for a special purpose, and refused to take it, the manufacturer was permitted to show, for the purpose of computing damages, that he had on hand a large amount of leather cut to the exact size required by the contract; that there was no sale in the market for such hose; and that consequently, on the buyer's refusal to take it, he was compelled to cut it down to a smaller size which could be sold, and that this involved a large loss of leather as well as labor.¹ And, in general, one who is prevented from finishing what he is supplying to order should be allowed such damages as will place him where he would have been had he been allowed to complete the contract.²

Where the buyer gives distinct notice to one who is manufacturing or supplying articles according to contract that he will receive no more, and countermands the bargain, the other party may treat the contract as rescinded concerning that portion which still remains undelivered: he need not go on making and supplying. Nor, indeed, would it be prudent to thus increase the hazard of expense to the buyer, without benefiting himself. For subsequent damages he would be properly entitled to the difference between the agreed price and the estimated cost to procure and deliver at the times and places agreed upon.³ He cannot safely go on making or procuring the articles, and then recover for loss sustained by their exposure to injury.⁴

The seller is sometimes said to be the agent or trustee of the buyer in disposing of the goods left on his hands by the

¹ *Chicago v. Greer*, 9 Wall. 726.

² See *Benj. Sales*, bk. 5, pt. 1, c. 1, § 1; *Cort v. Ambergate R. R. Co.*, 17 Q. B. 127; *Frost v. Knight*, L. R. 5 Ex. 322; L. R. 7 Ex. 111.

³ *Cort v. Ambergate R. R. Co.*, 17 Q. B. 127; *Clement, &c. Man. Co. v. Meserole*, 107 Mass. 362; *Danforth v. Walker*, 40 Vt. 257. And see *supra*, p. 282.

⁴ *Danforth v. Walker*, *supra*.

latter's breach of the bargain. Whether this be strictly true or no, the seller is certainly bound in all respects to act with reasonable prudence and diligence, and not recklessly, mindful of the buyer's interests so far as consists with the enforcement of his own rights.¹ If the buyer unreasonably refuse to accept goods which are quickly perishable, the seller ought not to allow them to be spoiled in his own hands, but should sell them quickly, so as to hold the buyer liable for the true difference between the price brought and the price agreed upon.² Here, as elsewhere, timely notice to the buyer of his intended acts at every step is fair and judicious, and fixes the defaulting party's liability more completely; though, in case of positive delinquency on the other side, not strictly requisite, especially if the emergency be pressing.³ Where no price was definitely fixed, the usual market price becomes the standard in estimating damages under the rule, to which incidental expenses may be added as in other cases; and it would, of course, be unjust to require the seller to take less than this where no definite stipulation to that effect had been entered into.⁴ The *time* to which reference is made for computing a market rate in estimating damages is the time when the goods were to have been delivered and received under the contract; not any earlier time at which the seller may have received notice of the buyer's intention to refuse them.⁵ And as to the *place* for computing the market value, this is the place of agreed delivery and receipt; and the seller has no right to take the refused goods to another and distant market, sell them there at a loss, and

¹ See *Dustan v. McAndrew*, 44 N. Y. 72.

² *Story Sales*, § 314; *Danforth v. Walker*, 40 Vt. 257; *Ullmann v. Kent*, 60 Ill. 271; and *post*, c. 13, as to re-sale.

³ *Story Sales*, §§ 435, 436; *Ullmann v. Kent*, 60 Ill. 271.

⁴ *Althouse v. Alvord*, 28 Wis. 577.

⁵ *Phillpotts v. Evans*, 5 M. & W. 475; *Benj. Sales*, bk. 5, pt. 1, c. 1, § 1; *Boorman v. Nash*, 9 B. & C. 145; *Clement, &c. Man. Co. v. Mese-role*, 107 Mass. 362.

then expect to recover the difference between the contract price and the proceeds of such sale, — not even with the deduction of his transportation charges.¹

Where the buyer dies or becomes bankrupt before delivery, the contract of sale is not necessarily rescinded ; but his legal representatives have the right to adopt the bargain with its incidental advantages and disadvantages. This will not, of course, prevent the seller from using the proper precautions to avoid parting with his property before the price is paid or secured ; and it is held, that, if goods are deliverable by successive instalments, the assignee of a bankrupt buyer cannot adopt the contract so as to claim further deliveries without paying the price of what was delivered prior to the bankruptcy.²

As the computation of damages is tested by the market value, the result would be the same whether the seller re-sold the goods, or retained them, as he might do, at their market valuation ; or, if he re-sold, whether the sale was by auction or by private sale, provided the sale were in good faith and sufficiently advantageous.³ As to the right of thus selling over, it makes no essential difference whether the goods be of a perishable nature or not, since all market values of commodities are subject to sudden fluctuation and change : it is only that the responsibility of delaying is greater, on his part, where there must be of necessity a speedy depression in the market value of that which is on his hands.⁴ In any case, the suit here brought is a special action for damages, and not an action upon a general count for goods sold and delivered.⁵

If the price was payable wholly or partly in other goods, the rule of damages and the seller's course of procedure must be adapted to the situation. It has been held, in a case where

¹ *Chapman v. Ingram*, 30 Wis. 290.

² *Ex parte Chalmers*, L. R. 8 Ch. 289.

³ *Story Sales*, § 436.

⁴ *Story Sales*, § 437.

⁵ *Story Sales*, § 437.

the seller agreed to take a certain commodity in payment, to be delivered at a specified time, and the buyer failed to deliver as agreed, that the buyer was liable to pay the highest market value of such commodity from the time of breach to the day of trial.¹ The foundation of such a rule is the impossibility of measuring the precise loss to the seller in absence of a standard; in which case the legal presumption is in favor of a maximum loss, and the buyer, who was alone to blame, takes the worst consequences of his delinquency.

Where government establishes a suitable tribunal for the redress of private parties with whom it may contract, — as in case of the United States Court of Claims, — an action may be brought by a government contractor to recover damages for its refusal to receive and pay for what it has agreed to purchase. But the government is not thereby rendered liable on an implied assumpsit for the torts of its officer, committed while in its service, though apparently for its benefit.² As to compelling a seller who is once absolved from performance by the buyer's delinquency to make a subsequent delivery, the general rule is, that if such pressure was brought to bear upon the buyer as would make the renewal of the contract void, as being obtained by duress, then there is no contract, and the buyer's proceeding is a tort for which he may be personally liable; but that, if the seller's consent is voluntary, then the contract to which he thus assents is binding, and must control the case; and that from whatever motive the seller may afterwards consent to renew the original agreement, and proceed to its fulfilment, its terms are the same.³

If the market value prove precisely the same as the contract price, the seller gets nominal damages only for the breach; and, if the market value be shown to considerably

¹ *Brasher v. Davidson*, 31 Tex. 190; *Story Sales*, § 445.

² *Gibbons v. United States*, 8 Wall. 269.

³ *Miller, J.*, in *Gibbons v. United States*, *supra*.

exceed the price, it is doubtful whether the buyer, who was foolish enough to break the contract, can interpose a claim for the excess; but if the article be of such a character, or the circumstances attending the case so peculiar, that the thing is absolutely worthless on the seller's hands, the seller will recover the whole price.¹ He ought to be put *in statu quo* as far as possible.

Special cases may arise which exempt the seller from accounting for the market value of his goods in the computation of damages.² Several American decisions are in point; as in the case of stock which was worthless to the seller because already transferred.³ The rule is thus stated by Sargent, J., in *Gordon v. Norris*:⁴ "In a large class of cases, . . . where the plaintiff has made surgical instruments of a particular kind, and according to order, for the defendant who had patented the same, and which would of course be worthless in the hands of the plaintiff, or where a tailor had made a suit of clothes to order, of a particular description, and for a particular measure, or a shoemaker had made boots or shoes to order, of a particular size and pattern, or the carriage-maker had made a carriage in the same way, of a particular style and pattern, or the artist has painted the portrait of an individual to order, or an engineer has constructed an engine according to order for a particular use, &c., though the mechanic or artist may sell the goods, if he choose, and recover of the defendant the difference between the contract price, and the price for which the article was sold, yet it is held that he may if he choose, when he has fully performed his part of the contract and tendered the article thus manu-

¹ See Sedgw. Damages, 5th ed. 312; *Allen v. Jarvis*, 20 Conn. 38.

² *Dunlop v. Grote*, 2 Car. & K. 153; Benj. Sales, bk. 5, pt. 1, c. 1, § 1.

³ *Thompson v. Alger*, 12 Met. 428. Cf. *Rand v. White Mountains Railroad*, 40 N. H. 79. And see *Bement v. Smith*, 15 Wend. 493; *Balentine v. Robinson*, 46 Penn. St. 147; Story Sales, § 314; *Gordon v. Norris*, 49 N. H. 383; Sedgw. Damages, 5th ed. 312; *Allen v. Jarvis*, 20 Conn. 38.

⁴ *Gordon v. Norris*, 49 N. H. 383.

factured to the defendant, or offered it at the place appointed, recover the full value of the article, and leave the defendant to sell or use or dispose of the article at his pleasure, and for the reason, in addition to that already stated,¹ that the article thus manufactured for a particular person, or according to a particular pattern, or for a particular use, may be of comparatively little value to anybody else, or for any other use or purpose; but this class of cases are recognized as exceptions to the general rule, which is to be applied in the sale of ordinary goods or merchandise which have a fixed market value." To this lucid exposition it should be added, that other considerations operate in favor of this class of exceptions; such as the care and annoyance to which a seller is exposed who has the burden of either forcing into the market at once an article which requires time and special opportunity for disposal at a fair valuation, or else of watching and waiting for customers who may never appear; also the possible hope that the buyer may finally conclude to take what ought to be worth more to him than to any one else; and the certainty, moreover, that the property is not of a character to perish or deteriorate meanwhile. The reason of the exception, on the whole, then, appears to be, the parties' mutual interest in averting the sacrifice of an article not in general market demand, and yet of much use to special individuals, on the one hand, and the injustice, on the other, of requiring the seller, rather than the delinquent buyer, to make an advantageous re-sale; and in this lies, we conceive, the proper limitation of the exception.

But in New York the seller's privileges in case of the buyer's non-acceptance are more broadly announced; and his remedy to sue for and recover the whole contract price, leaving the buyer to sell the thing as he can, is put as available,

¹ Referring to the fact of its being rather a contract to make something to order than to supply goods already existing.

not by way of exception, but as a general alternative. The seller, in any case, is thus given the choice between these three remedies: (1st.) To sell the thing on behalf of the purchaser upon notice, and recover the difference between the contract price and that realized on the sale. (2d.) To retain the thing as his own, and recover the difference between the contract price and the market price at the time and place of delivery. (3d.) To hold the property for the purchaser, and recover of him the entire purchase money.¹ If he elects this last remedy, he holds the property as a sort of trustee for the buyer;² and we may well suppose, not only that he is obliged to give it up upon receiving payment of the proper price afterwards, but likewise that he should do nothing towards obstructing the buyer in disposing of the thing to some third party under these untoward circumstances; for the law will not allow even the delinquent party to a contract to be recklessly exposed by the other to a loss greater than naturally results from the breach.

The seller should not be allowed to gain instead of losing by the buyer's default; and if suit is brought upon a contract for the sale and delivery of goods, where only a portion of the goods have been delivered and part payment has been made, and the buyer refuses to receive and accept the residue when tendered, the seller can recover only nominal damages, provided the undelivered portion exceeds in value the unfunded balance of the purchase price. But the delivery of a portion only of the goods agreed to be furnished under an entire contract may be so accepted and appropriated by the buyer for his own benefit, as to entitle the seller, where he is not at fault, to recover the reasonable worth of the goods delivered, not exceeding the contract price.³

¹ *Dustan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 526. But the seller is put to his election, once and for all, between these remedies. *Westfall v. Peacock*, 63 Barb. 209.

² See Church, C. J., in *Hayden v. Demets*, *supra*.

³ *Wilson v. Wagar*, 26 Mich. 452. See Christiancy, C. J., *ib.*, as to

Parties concerned in a sale may agree in advance as to the amount of damages which shall be payable in case of a breach; in which case the damages are to be assessed in pursuance of the agreement, notwithstanding substantial damages may be thereby awarded where the law would have given merely a nominal sum.¹ But penal and liquidated damages under a contract are to be distinguished; and courts incline, in cases of doubt, to the former construction.²

(2d.) Where the transfer of property has fully taken place. In the event of an out-and-out transfer of title, which carries property right, full possession, and possessory rights, to the buyer, the seller cannot sue in a special capacity, but is left in the position of a mere creditor. Nothing remains but for him to sue for his price; attaching, it may be, on mesne process or on execution, as the local practice may permit other creditors to do in actions of contract; taking his place with other creditors to obtain a dividend if the buyer goes into bankruptcy; but, at all events, with no better hold upon the goods he has sold than any other general creditor of the buyer. For the goods are now the buyer's, and part of his general assets; and rights and remedies go accordingly. And herein is seen the disadvantage of selling on credit, and knowingly parting with one's own goods before payment; taking the buyer's promise to pay in lieu of the cash. The seller, being thus driven to sue as for breach of a promise to pay, may recover in a personal action the price promised; to which would fairly be added interest, and the costs of suit, as the ordinary limit of damages.³

the buyer's right to recoup his damages for breach of the contract in cases of part performance. And see *Bartholemew v. Markwick*, 15 C. B. N. S. 710.

¹ See *Matthews v. Discount Corporation*, L. R. 4 C. P. 228.

² See *Jemmison v. Gray*, 29 Iowa, 537, 547.

³ *Benj. Sales*, bk. 5, pt. 1, c. 1, § 2; *Martindale v. Smith*, 1 Q. B. 395; *Story Sales*, §§ 236, 441.

But such rights as the seller may have possibly reserved by taking security for the price are still available to him, though from this point he is viewed rather as a creditor than a seller; and furthermore, delivery upon a condition inconsistent with vesting full title in the buyer, so long as it remains unfulfilled, leaves the seller a hold and remedies *in rem* accordingly. The law of England and America, as we shall hereafter see, supplements the seller's lien by the right of stoppage *in transitu*;¹ but it does not, like the civil law, go to the extent of justifying the seller in suing, upon the buyer's default, as for rescission of the contract, where no such right had been expressly reserved.² The possession acquired by the buyer, which thus puts the seller to his personal action for breach, is a possession with the seller's consent; for, of course, wrongful possession, though peaceably acquired, before payment, cannot be set up to defeat the seller's remedies against the goods, but, on the contrary, gives him the choice to sue for the money, or bring trespass.³

Where the transfer to the delinquent buyer was completed, the seller sues for his price on the common counts for goods *sold and delivered*; not, as in the former case, specially for their non-acceptance.⁴ But a special declaration is requisite, where payment was to be wholly or in part by bill or note; and, where the buyer has given a bill in payment, the seller must, in absence of fraud, wait until it matures before suing for his price, and must account for the paper if dishonored.⁵ So, where credit was given, he must wait until the time expires.⁶ In suing for the price of goods sold and delivered, the seller should prove delivery at the place agreed, and full performance on his part; but he need not show acceptance by the buyer.⁷

¹ *Infra*, c. 14.

² Benj. Sales, bk. 5, pt. 1, c. 1, § 2.

³ Riley v. Wheeler, 42 Vt. 528; Noy Max. 87; Story Sales, §§ 430, 431.

⁴ Benj. Sales, bk. 5, pt. 1, c. 1, § 2; Story Sales, § 441.

⁵ Benj. Sales, bk. 5, pt. 1, c. 1, § 2; *supra*, p. 436; Story Sales, §§ 442-444.

⁶ *Ib.*

⁷ Nichols v. Morse, 100 Mass. 523. And see McCormick v. Hamilton, 23 Gratt. 561.

If a sale contract be partially fulfilled, and the buyer then gives the seller such notice as entitles him to rescind, while yet retaining the goods already sent, the seller may at once sue for the value of the goods delivered, in an action on the new contract resulting from the buyer's conduct.¹

Of the seller's damages in the intermediate case, where the right of property with risks of ownership has passed to the buyer by the completion of the bargain, and yet the goods remain on the seller's hands with delivery of possession unsurrendered, the books make little or no special mention. Yet here the title to the goods has passed, not in its fullest, but only in a partial, sense. The proper count would here be that of goods *bargained and sold*; and the rule of damages appears not unlike that where goods are *sold and delivered*; namely, that the seller shall recover the contract price of the goods.² But the lien advantages which the seller further enjoys under his continued possession in this intermediate case may be studied in the succeeding chapters.

¹ *Bartholemew v. Markwick*, 15 C. B. N. s. 711.

² See *Gordon v. Norris*, 49 N. H. 376, which discusses this subject; *Sedgw. Damages*, 5th ed. 312; *Thompson v. Alger*, 12 Met. 428; *Ballantine v. Robinson*, 46 Penn. St. 177; *Ganson v. Madigan*, 13 Wis. 67; *Orr v. Bigelow*, 14 N. Y. 556. So in *Benj. Sales*, bk. 5, pt. 1, c. 1, § 2, the seller's damages are thus stated in general terms, "where the property has passed," without distinguishing between goods *bargained and sold* and goods *sold and delivered*. See c. 13, where the seller's remedies *in rem* are more fully discussed.

CHAPTER XIII.

SELLER'S GENERAL REMEDIES AGAINST THE GOODS.

THE last chapter, in setting forth the seller's remedies by personal action against the delinquent buyer, drew a distinction between those cases where the property transfer has been made and those where it has not. In pursuing this subject still further, with reference to the seller's remedies against the goods where the title has not passed out of him, we shall presently treat (1) of re-sale, (2) of lien, and (3) of stoppage *in transitu*.

We have perceived that as a full transfer of title involves the right of possession and actual possession, as well as the right of property,¹ so there may be an intermediate case where the seller has sold the thing so as to carry over the right of property to the buyer, and yet has not delivered possession. Now, it is with reference to this intermediate case—where, on the one hand, the seller is no more an owner with power to sell over to a new customer, and yet, on the other, keeps the goods in his possession, so as easily to balk the present customer of his full enjoyment—that the law of sales is in perplexity as to remedies. I have sold you a specific bale of cotton or a herd of cattle; and we admit that the loss falls upon you if the bale be burnt up or some of the cattle perish before you acquire custody, because you have the property therein. But, supposing you make default in payment before I part possession, must I sue for damages as my sole recourse

¹ *Supra*, p. 3.

for redress? Is it not hard, if, with the chattels still under my control, I cannot make them the means of indemnifying myself against loss upon your breach of contract? Here the common law by subtle contrivance manages to help the seller, who has substantial justice on his side. This contrivance is the recognition of a *lien* in the seller for his price, so long as he does not part with the goods, in aid of which comes the right of stoppage *in transitu*.

This lien right is efficacious for most practical purposes. But, as the theory of a lien right is that the seller does not yet mean to surrender his possession, there come the questions, Does this lien right exist? or has the seller any kind of a legal hold upon the goods still in possession, if he has once waived this right, and subsequent developments make it for his interest to withdraw the waiver, and insist upon maintaining his right *in rem*? Thus, if the sale above instanced were plainly on credit, instead of for cash on delivery, am I, as seller, without a legal remedy *in rem*, because of my waiver of a price down, notwithstanding I learn that the buyer has become insolvent before he has taken the bale of cotton or the herd of cattle out of my custody?

The main question is answered favorably to the unpaid seller; though, in practice, numerous difficulties will occur in applying a principle so obviously just. Bayley, J., in 1825, stated the seller's right as something more than a possessory lien. "The vendor's right in respect of his price," he says, "is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property vest at once in him. But his right of possession is not absolute: it is liable to be defeated if he become insolvent before he obtains possession. If the seller has despatched the goods to the buyer, and insolvency

occur, he has a right, in virtue of his original ownership, to stop them *in transitu*. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right.”¹ In later English cases, the seller’s right of retention has been conceded, while the court inclined against regarding the case as one strictly of lien, but rather as something analogous to the seller’s right of stoppage *in transitu*.² But Lord Campbell emphatically repudiated in the House of Lords any supposed analogy between this right and that of stoppage *in transitu*. “That doctrine,” he says, “appears to me to have no more bearing on this case than the doctrine of contingent remainders;” and he proceeds to state, that, in his opinion, it was clearly the revival of the lien which entitles the vendor to exercise his right where the sale was made a waiver of lien, and the buyer afterwards proved insolvent.³ Furthermore, it has been said that the seller’s right to thus retain the goods for security is not properly a lien, but a special interest growing out of his original ownership, independent of the actual possession, and consistent with the property being in the buyer.⁴

In this country, where the right is likewise admitted, the ground on which the rule rests has sometimes been stated still differently. Chief Justice Shaw was of the opinion that the waiver of a price lien is only a conditional one. To quote his own words: “The law in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition; which is, that the vendee shall

¹ *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, 4 B. & C. 951.

² *Crompton, J.*, in *Griffiths v. Perry*, 1 E. & E. 680.

³ *McEwan v. Smith*, 2 H. L. Cas. 309. And see *Benj. Sales*, bk. 5, pt. 1, c. 2; *Story Sales*, § 290.

⁴ *Dodsley v. Varley*, 12 Ad. & E. 632.

keep his credit good.”¹ But some other American courts appear to favor this right as analogous to stoppage *in transitu*.²

The principle, whatever be its origin and foundation, to which these and similar cases point, is, that, so long as the seller keeps actual possession of the goods, he may treat them as security for his price, and thus avert disaster from the buyer's bankruptcy or insolvency; any previous agreement to waive his usual lien being presumed to have contemplated a continued ability to pay, on the buyer's part, up to the time of receiving possession and a full title.³

The nature and extent of an unpaid seller's claim on the goods he holds, under the present circumstances, command special attention in the English courts. We may first view the controversy as between the unpaid seller and the bankrupt or insolvent buyer or his assignees, which is the simplest case. It was decided, as early as 1825, that the assignees of an insolvent buyer are not entitled to sue in trover the unpaid seller who has the goods still in his own warehouse, notwithstanding the sale was on credit.⁴ In 1833, *Miles v. Gorton* affirmed the same rule as between the seller and the bankrupt buyer's assignees, although the seller kept the goods in his warehouse, by way of bailment, at the charge of the buyer.⁵ A still stronger case was *Townley v. Crump*, decided in 1836, where the seller had actually given to the buyer an invoice describing the goods and a delivery order which stated distinctly, “We hold to your order” the property in question, rent free for two months. But, while giving this

¹ *Arnold v. Delano*, 4 Cush. 33.

² *White v. Welsh*, 38 Penn. St. 396. And see *Thompson v. Baltimore, &c. R. R. Co.*, 28 Md. 396; *Southwestern Freight Co. v. Stanard*, 44 Mis. 71; *Clark v. Draper*, 19 N. H. 419.

³ See *Story Sales*, §§ 287, 398; *Benj. Sales*, bk. 5, pt. 1, c. 2.

⁴ *Bloxam v. Sanders*, 4 B. & C. 941; *Bloxam v. Morley*, 4 B. & C. 951.

⁵ *Miles v. Gorton*, 2 C. & M. 504; *Townley v. Crump*, 4 Ad. & E. 58.

delivery order and invoice, the seller took in return the buyer's acceptance at three months, which became dishonored on maturity by reason of the buyer's insolvency: whereupon the seller, who was still warehouse-keeper, and had not parted with the goods, claimed the right to hold them for the buyer's default. The local trade usage was for the seller of goods in warehouse to hand a delivery-order to the buyer by way of delivering the goods. The court decided, that as between the original seller and buyer — no third party's rights having intervened — the former had not lost his hold upon the goods by the mere fact of giving the latter a delivery-order while retaining the goods as custodian, though credit was given.¹

In conformity with this doctrine, it is further decided, that where the buyer's paper is dishonored on maturity, and he goes into bankruptcy, and the seller thereupon refuses to make delivery under the contract, the buyer's assignees can be no better off in respect of damages than the buyer himself would have been; and that at most they can recover no more than the possible difference between the contract price and the market price if the seller chooses to retain the goods.² Nor matters it, as to the seller's right to thus secure himself, that the sale was an executory contract to supply goods instead of the bargain for specific chattels.³ Upon the whole, the unpaid seller's remedy against the goods remaining in his

¹ *Townley v. Crump*, 4 Ad. & E. 58. "It is impossible," says Mr. Benjamin, "to imagine a clearer case than this of the vendor's agreement to change the character of his possession into that of a bailee for the buyer; but this sort of delivery was not allowed so to operate as to force the vendor to give up the goods to the buyer's assignees in bankruptcy. Yet it cannot be doubted that the vendor had done all that he was bound to do in performance of his contract before the buyer's insolvency, and that he could have maintained an action for goods sold and delivered." *Benj. Sales*, bk. 5, pt. 1, c. 2.

² *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 E. & E. 680.

³ *Griffiths v. Perry*, *supra*.

custody, be it in the capacity of seller still or only of bailee, remains unimpaired until he makes actual delivery; and, even if he gives a delivery-order upon his own warehouseman or bailee who holds them in custody, he may countermand that order, notwithstanding its indorsement by the buyer, until such bailee attorns over.¹

The English Chancery Court on appeal has just reaffirmed the doctrine of the unpaid seller's lien under a somewhat novel state of facts. A contract for the purchase of rails stipulated that payment should be made "by buyer's acceptance of seller's drafts at six months' date against inspector's certificate of approval, and wharfinger's certificate of each 500 tons being stacked and ready for shipment." Certificates were delivered in exchange for the buyer's acceptances of bills: the seller negotiated the bills, and the plaintiff advanced money to the buyer on the faith of the certificates. The buyer became insolvent, the acceptances were dishonored, and the seller claimed to hold the rails as his own. It was decided that the seller's lien was good, notwithstanding the plaintiff's loan by way of pledge to the buyer.² Here the question was one of legal rights under the contract; and the case was to be tried as it would have been tried in an action of trover at law, in case the purchaser, or the purchaser's assignee, had brought such an action. The plaintiff, being only an equitable mortgagee, a mortgagee by deposit, could not have brought it in his own name; and therefore the question was one of legal right. No third person's rights had intervened. The bargain in question was for payment by a buyer's acceptance of a seller's drafts. "Whoever heard of such a thing in a mercantile contract," says Sir G. Melish, L. J., "when it is said that payment is to be made by buyer's acceptance of seller's drafts, that if the acceptance

¹ *McEwan v. Smith*, 2 H. L. Cas. 309.

² *Gunn v. Bolckow*, L. R. 10 Ch. 491, reversing the Vice-Chancellor's decree (1875).

was dishonored, the right to sue under the original contract did not revive? . . . No doubt, if the buyer does not become insolvent, that is to say, if he does not openly proclaim his insolvency, then credit is given by taking the bill, and during the time that the bill is current there is no vendor's lien, and the vendor is bound to deliver. But if the bill is dishonored before delivery has been made, then the vendor's lien revives; or if the purchaser becomes openly insolvent before the delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser. . . . The case is the simple ordinary case of a vendor who has sold goods upon credit, and before the time has arrived for the delivery of them the purchaser has become insolvent, and has given notice to all the world and to his creditors that he is insolvent. The vendor cannot rescind the contract, according to the late decisions, but he is entitled to say, I will not deliver the goods until I get actual payment." In the same case it was further held that it makes no difference that the seller has negotiated the bills, because he has no security on the bills, and there is no third party to them.¹

The doctrine in this country, though not developed so fully, tends in the same direction. The seller of goods is held to have the right to refuse or countermand the final delivery, if the buyer prove insolvent, so long as the goods remain in his possession or in the custody of his agents.² And where wood was marked off and identified, and the purchaser had a license to go on the land and take it, but did not do so, the seller, upon the buyer's insolvency, was permitted to keep possession of the wood as security for the price against the buyer's assignee in insolvency.³ But whether the charge of capacity under which the seller continues to retain the goods shall affect the issue, appears not yet to be determined.

¹ *Ib.*

² *White v. Welsh*, 38 Penn. St. 396; *Arnold v. Delano*, 4 Cush. 33.

³ *Arnold v. Delano*, 4 Cush. 33.

It was intimated some years ago by one of our State courts that a constructive delivery sufficient to defeat the unpaid seller's remedy against the goods might occur, where the party selling acquires the character of a bailee; the case being instanced of a stable-keeper with a horse to sell, who makes a sale to C. D., and then transfers the horse to his livery-stable to be kept for C. D. at a stipulated weekly hire.¹ But this expression of opinion, by way of *obiter dictum*, antedates some of the most positive of the English decisions above noted; and it is by no means sure that our American courts, brought to the actual test, would turn a constructive change of possession and custody on the seller's part to his disadvantage, as against the buyer and his assignees, where no actual change had occurred, more readily than those of Great Britain. For, after all, the remark is just, that the vendor still in possession has a higher equity to retain for the price than the assignee of a debtor who has not paid for the chattel has to claim it for the general creditors.² But doubtless, after an attornment is once made by the seller's agent or bailee to the buyer, in conformity with the seller's direction, the seller's right to detain under a claim of lien is gone; for the seller's agent, by such attornment, becomes the agent of the buyer.³

Now to view the subject where the controversy is between the unpaid seller retaining the goods and a sub-vendee of the buyer. This situation of things is more embarrassing than the former; for it must be admitted that the equity of the seller is less as against a third party who becomes a *bona fide* purchaser for value than where the strife was confined to the original parties and their representatives. But the Eng-

¹ Arnold v. Delano, 4 Cush. 33, *per* Shaw, C. J.

² *Ib.*

³ See Thompson v. Baltimore, &c. R. R. Co., 28 Md. 396. As to the slight advantage which the assignee has over the bankrupt himself, under the U. S. Bankrupt Act, see *Ex parte* Rockford, &c. R. R. Co., 3 Low. 345.

lish cases cover this point likewise; sustaining the seller in his claim to keep the goods for his better security, so long as he does not by his acts and conduct give his express or implied assent to the sub-sale. By merely indorsing over the delivery-order for goods which are not yet surrendered to him, the buyer confers on a third person no greater rights than he has himself; that is to say, no right at all, as against the unpaid seller still in possession.¹ For the seller or his custodian must deliver the goods, or the custodian must attorn in compliance with the order.²

But how may the seller by his acts and conduct so sanction the sub-sale as to be estopped from asserting that his price lien remains? *Stoveld v. Hughes*, decided in 1841, is instructive on this point. Timber sold by the defendants to one Dixon, the original buyer, was marked with his initials in pursuance of the bargain and by mutual concurrence of the parties: the timber was to be delivered by the sellers at a certain place; and for the price Dixon gave his acceptances at three months, which, however, were dishonored at maturity, Dixon going into bankruptcy. Meantime, and after the sellers had delivered a small portion of the timber, Dixon sold the lot as it lay to the plaintiff, who paid him the price. The plaintiff informed the defendants that he had bought the timber of Dixon: they replied, "Very well," and took the plaintiff to their wharf, where the timber was lying. The plaintiff marked the timber with his own initials, and told the defendants to send no more of the timber to Dixon; to which the defendants made no objection. Upon these facts Lord Ellenborough said: "If that be not an executed delivery, I know not what is so." And the sellers, though unpaid, were held to have no right in the goods as against the plaintiff.³ *Pearson v. Dawson*, a much later decision,

¹ *McEwan v. Smith*, 2 H. L. Cas. 309.

² See *supra*, pp. 561, 563.

³ *Stoveld v. Hughes*, 14 East, 308.

turned upon a similar state of facts. A party sold sugar in hogsheads, and took the buyer's acceptance for the price. The sugar remained in his bonded warehouse, whence no part could be removed without paying the government duties. This buyer made a sub-sale to the plaintiffs of twenty specified hogsheads, and sent them with a written delivery-order to the original seller, who, upon inspecting it, wrote in pencil on his "sugar-book" the plaintiffs' names opposite the particular hogsheads, and afterwards gave such warehouse orders from time to time, in recognition of the sub-buyers' title, as enabled them to pay duties and take away nearly one-half of the hogsheads before the original buyer's paper went to protest. The original seller claimed a lien for his price on the hogsheads not already taken away by the sub-buyers; but the judges unanimously agreed that he could not hold them for what the original buyer still owed him, after having so recognized the delivery-order and the sale to the sub-buyers.¹

But, on the other hand, the unpaid seller's lien claim, even against sub-vendees, is not absolutely defeated where orders or other *indicia* of title were procured by a sub-buyer irregularly and without the seller's consent.² Nor, in general, where the sub-buyer neglects to take actual or constructive possession under the sub-sale.³ Nor can that which passes between third persons—as, for instance, between the sub-vendee and one mistakenly supposed to be the original seller's agent—be set up as an estoppel to the original seller and owner himself.⁴ In short, the unpaid seller must, in some manner, have had the sub-sale brought to his notice, and so acted with reference to the new purchaser, whether by tacit acquiescence or open approval, as naturally led the latter to conclude that all was right in the original transac-

¹ *Pearson v. Dawson*, E. B. & E. 448.

² *Craven v. Ryder*, 6 Taunt. 433.

³ *Dixon v. Yates*, 5 B. & Ad. 313.

⁴ *McEwan v. Smith*, 2 H. L. Cas. 309.

tion, and his own title free from any lien incumbrance; else the seller may reassert his right at any time while the goods remain in his possession unpaid for, and the buyer's credit has become dishonored.

In what has been said of the seller's lien, we have supposed that such documents as may have passed by way of *indicia* of title between the parties had no such negotiable characteristics as to carry the rights of ownership necessarily to a *bona fide* transferee for value when unaccompanied by the goods; but that bills of lading might operate to this extent, because of the peculiar qualities conceded to such instruments, while delivery-orders cannot, is sometimes suggested.¹

The reason of suffering one's lien to be defeated by third parties on the suggestion of estoppel, according to the English cases, is seen in this: that the party claimant, by his acts and conduct, by his express statements, or even by his culpable silence, causes the third party to take a different course from what his interests would have prompted, supposing the buyer from whom he derived title had no right to sell; that the original seller in possession, the party of all others whose duty it was to disclose his lien claim, when called upon, thereby remitting the sub-buyer promptly to his own remedies against a party in failing circumstances, lulled him to repose, and suffered him to remain in his fancied security. The principle is a broad one, and, in the interests of justice, may be deemed to extend to general parties in possession of goods protecting adverse claims which they cause the other party to believe do not exist, thus inducing him to divert his course to his disadvantage, while their own interests could not have suffered by a true disclosure of the facts. The doubt is, however, as to how far one may be held legally responsible for such conduct, where he holds off as though to care for nobody's interests but his own, and takes the attitude of passive indifference:

¹ See Lord Campbell, in *McEwan v. Smith*, 2 H. L. Cas. 309; *Gunn v. Bolckow*, L. R. 10 Ch. 491; c. 14, *post*.

for the cases which apply the rule involve for the most part an active participation of some sort in the affair which so imperils the third party's interests; an encouragement of the latter's course, if not expressed in so many words, at least implied by lending a motive power in that direction.¹ To estop a party by his representation or conduct from setting up his own claim against the other party whom he has misled or diverted, it must generally appear that the former knew, or ought to have known, that the latter would be injuriously misled in consequence of such representation or conduct on his part; also that the latter was so misled; and, if the intention to mislead does not appear, the case must, at all events, show negligence.²

It is proper to distinguish, in such cases, the separate relations which the seller may bear; as concerns the original buyer, on the one hand, and the sub-vendee or third party, to whom he has made representations amounting to estoppel, on the other. In *Woodley v. Coventry*, the defendants had sold so many barrels of flour, to be taken from a larger quantity; the buyer had obtained advances on the flour from the plaintiff, giving him a delivery-order; the plaintiff had presented the order to the defendants, who said, "It is all right," and showed samples of the flour. Trover was brought for the flour, the original buyer having absconded. Had the controversy been between the original buyer and seller, the defence might have been made that the property had not vested for want of a specific subject-matter, and that trover was inapplicable. That defence was here set up; but the court properly ruled it out, because the material question was as between the original seller and the pledgee, the present parties,

¹ See *Benj. Sales*, bk. 5, pt. 1, c. 2; *Pickard v. Sears*, 6 Ad. & E. 475; *Freeman v. Cooke*, 2 Ex. 654.

² *Ib.*; *Bigelow Estoppel*, 552-577, and cases cited; *Cornish v. Abington*, 4 H. & N. 549; *Manufacturers' &c. Bank v. Hazard*, 30 N. Y. 226; *In re Bahia, &c. R. R. Co.*, L. R. 3 Q. B. 584.

whether the former had not, by their admission, recognized the right of the original buyer to dispose of so many barrels in their possession.¹ The later case of *Knights v. Wiffen* was decided upon a state of facts quite similar. The original seller, and defendant in the suit, said, on receiving the sub-vendee's letter and the delivery-order for barley: "All right: when you get the forwarding note, I will put the barley on the line." Three sacks were weighed; but, by the time the forwarding note was duly presented, the original buyer had become bankrupt. The defendant claimed that no property had passed as against the sub-vendee, who sued as plaintiff for conversion of the barley.² In both of these cases the original seller was a warehouseman, holding a large quantity of which an unspecified portion was ordered by the delinquent buyer; and the attempt was made to retain the property as security for an unpaid price, as against a sub-vendee.

But *Knights v. Wiffen* goes one step farther, in estopping the original seller, than *Woodley v. Coventry*. In the former case the plaintiff had so far relied upon the defendant's recognition of the sub-sale, that he thereupon made an advance of money; which was very clearly changing his own position within the rule of estoppel. But in the latter the plaintiff, in fact, paid the money before he presented the delivery-order. Had, then, the defendant's recognition of the sub-sale and delivery-order, as all right in this latter instance, the effect of placing the plaintiff in a changed position, and making him a sufferer in consequence of the defendant's conduct? The court asserted emphatically that it had; for, as Blackburn, J., suggests, unless the defendant had acted and said as he did, the plaintiff could have gone at once to the buyer and demanded back his money, instead of resting quietly until the buyer became bankrupt. The English courts, therefore, ac-

¹ *Woodley v. Coventry*, 2 H. & C. 164.

² *Knights v. Wiffen*, L. R. 5 Q. B. 660. See *Barnard v. Campbell*, 55 N. Y. 456.

according to this late exposition of doctrine, take high ground as concerns estoppel, and uphold the third party's rights, not only in case of damages clearly resulting as a consequence of the possessing party's conduct, but wherever the third party has been thereby induced to abstain from pursuing active measures which might have afforded him some relief.

In this country, estoppel, though constantly applied as a legal doctrine, has been less frequently invoked in sale controversies between unpaid sellers in possession and third parties. *Scudder v. Worster* appears to be at variance with the English cases; but perhaps only on the technical issue, whether there can be an estoppel set up to defeat the seller's lien and in aid of a third party's action of replevin, where the sale was, not of specific goods, but of an unspecified portion, and no appropriation has taken place under either the original sale or the sub-sale. The facts here showed that the sellers had agreed to sell so many barrels of pork to the buyer upon the credit of his mercantile paper, and gave a bill of sale of the quantity; that the buyer made a sub-sale to the plaintiff, issuing a delivery-order for 150 barrels; that the plaintiff thereupon gave the original sellers notice of his purchase, and asked them to hold the same on storage for him, to which they assented; and that, the original buyer becoming insolvent, the sellers refused to deliver to the plaintiff barrels corresponding to the delivery-order. The 150 barrels in controversy were removed from the sellers' storehouse on his writ of replevin. Upon these facts, the court gave judgment for the sellers; and as to the point taken on the plaintiff's behalf, that the sellers were estopped to deny that the 150 barrels were the property of the plaintiff, it was observed by Dewey, J., that, had this been an action to recover damages for the value of 150 barrels of pork, the position might be tenable, and the sellers estopped to deny the plaintiff's property; but it was otherwise with a replevin suit in which the

plaintiff claimed these 150 barrels as his own. "To sustain the former, it is only necessary to show a right to 150 barrels generally, and not any specific 150 barrels; but to maintain replevin, the plaintiff must be the owner of some specific 150 barrels."¹ The assent of the seller to the sub-sale, upon notice thereof, would still appear to be fatal to his claim of price lien, under the original sale, as against a proper suit brought by the sub-vendee, notwithstanding the property in the goods had never passed from himself to the original buyer.

It is, then, the title as disclosed, not the title as existing between original parties, which tests one's lien as against any third party knowingly let into the transaction; and where A. puts chattels into B.'s hands, with the understanding that B. shall sell them as his own (for reasons of convenience kept to themselves), and, on B.'s representations of ownership thus authorized, the chattels get attached as B.'s property, it is held that A. is estopped, as against the attaching creditor, from asserting that the property is his.²

There is a late American bankruptcy case, where manufacturers of engines obtained from the petitioner, as one of their customers, pay in advance of completing the work, on a false representation that the engine had been finished, and delivered to a carrier, to be delivered to the customer. In point of fact, the engine was not finished at the time, nor even in existence; but the manufacturers were at work on two engines precisely alike, either of which would have satisfied the contract. The first was finished, and then delivered to another customer. The second was worked upon, being known in the shop as that of the petitioner, and marked with his initials. Within a few hours of the completion of this latter engine, proceedings

¹ *Scudder v. Worster*, 11 Cush. 573 (1853). But cf. *supra*, *Woodley v. Coventry*, 2 H. & C. 164, and *Knights v. Wiffen*, L. R. 5 Q. B. 660.

² *Drew v. Kimball*, 43 N. H. 282.

were commenced which threw the manufacturers into bankruptcy. The assignees refusing to give up the engine, the petitioner claimed it as his own. Lowell, J., granted the petition; one ground of his decision being that the bankrupt and his assignees were equally estopped from asserting that the chattel in question did not exist and was not complete at the date when payment was obtained on the representation that it was done and on its way, unless they could show some other engine to which the representation applied. Nor did it embarrass the case that there were two engines made precisely alike: the bankrupt and his assignees could not say that the present engine was not the one referred to as the petitioner's, or that it had not then an existence, unless they could show some other engine which did exist and was the one.¹

Upon the principle of estoppel, warehousemen may sometimes make themselves liable to both the sub-buyer and the original seller: to the former, because of conduct inducing him to take a course otherwise prejudicial to his interests; to the latter, provided such conduct was in no respect under cover of authority conferred by himself, and the goods should have continued in their custody on his behalf.² And so is it with others who stand similarly related to different parties. Nor is the measure of liability as to the one party necessarily the standard to be applied with respect to the other. A warehouseman or agent who has once attorned to a party as sub-vendee, whatever might be the rule as between the original seller and buyer, cannot afterwards disaffirm his acts and admissions, and dispute the sub-vendee's title to the goods.³

Now as to re-sale. We have already shown that a seller is

¹ *Ex parte* Rockford, &c. R. R. Co., 1 Low. 345.

² *Benj. Sales*, bk. 5, pt. 1, c. 2; *Story Sales*, § 289.

³ *Ib.*; *Stonard v. Dunkin*, 4 Camp. 344; *Hawes v. Watson*, 2 B. & C. 540; *Knights v. Wiffen*, L. R. 5 Q. B. 660; *Barnard v. Campbell*, 55 N. Y. 456.

expected to sell over goods for which the buyer defaults payment of the price, provided the property in the goods has not passed out of himself, and then sue for the difference in damages; but that where the property therein has passed, and the goods are delivered out of the seller's possession, the title of the buyer is such that the seller can only sue in damages, attaching like other creditors, and having no right to take the goods again by virtue of his former ownership.¹

But the intermediate case is one of theoretical difficulty; for—though the seller has an undoubted lien upon the goods while he continues to hold them—to sell them over, and pass title to a new purchaser, involves a rescission of the old contract; and rescission of a contract, we know, is not optional with one, but requires the mutual assent of both parties. The seller of perishable goods, specified and appropriated to the contract, whose property has passed from seller to buyer, but whose possession is still in the seller, is reduced, then, to this dilemma, where his price remains unpaid: he must put the goods upon the market at once, and sell them over, doing what he has no right to do; or he must make his lien security worthless by suffering the goods to spoil on his hands.

This intermediate case, the law of which was left in doubt in our last chapter, is now to be studied chiefly in the light of recent adjudications: for how the law stood in England during the first half of this century, as Mr. Blackburn said, no one would answer positively; nor in America, to this day, has the seller's right of re-sale in such a contingency received critical attention.² The main issue is this: How shall an unpaid seller enforce his lien?

The late English cases have gone far towards determining, that where the bargain is completed, and the property in the goods has passed from seller to buyer, the seller still retaining

¹ *Supra*, pp. 545, 547, 553.

² *Supra*, p. 555; Blackb. Sales, 325.

possession for his price, a default of payment on the buyer's part does not, *per se*, entitle the seller to re-sell the goods by virtue of the possession in himself; but, if he re-sells, he commits a breach of contract, and is at least liable for nominal damages. He may, however, by having expressly reserved the right to re-sell under such circumstances in the original contract, stand with his remedy perfect. And, after all, since the re-sale is found a very convenient method of giving the seller his rightful dues, and, in the case of fluctuating and perishable commodities particularly, is sufficiently advantageous to the buyer who stands indebted, it would appear that, practically, the seller runs no risk in selling over, beyond being held to an adjustment of mutual demands with the buyer, in which he is likely to suffer less than he would have done by keeping the property to spoil and become worthless.¹ Moreover, the buyer's default, followed by the seller's re-sale, seems to constitute a rescission of the contract in such a sense that the buyer is not permitted to follow the goods into the new purchaser's hands and reclaim them as his own, but must look to his own adjustment of damages with the seller for indemnity, if indemnity be his due. The only hazard worth regarding which the seller runs in the matter is that of assuming the buyer's actual default; for even if he sells over, supposing the buyer in default, and the buyer be not in default, the buyer may maintain trover for the goods wherever he can find them.²

We have seen, in our former volume, that the common-law lien gives one a right of holding goods for security, but with very imperfect means of enforcing that right, leaving him, in the absence of some quickening statute, in possession, without the opportunity to sell and get his money's-worth.³

¹ Benj. Sales, bk. 5, pt. 1, c. 3; *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 E. & E. 680.

² See *Gosling v. Birnie*, 7 Bing. 339; Benj. Sales, bk. 5, pt. 1, c. 3.

³ 1 Sch. Pers. Prop. 482, 497, 498.

Hence is the right of an unpaid seller, with the goods in his possession, though commonly called a lien, something in truth better than a lien, because more efficacious; perhaps more analogous to the pawnee's right, which, we have also seen, gives more ample means of enforcement.¹ Judge Blackburn may be quoted in support of the latter view; for of the seller's rights he thus laid down the law as early as 1845: "The better opinion seems to be that in no case do they amount to a complete resumption of the right of property, or, in other words, to a right to rescind the contract of sale, but perhaps come nearer to the rights of a pawnee with a power of sale, than to any other common-law rights. At all events, it seems that a re-sale by the vendor, while the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it still due; nor yet so tortious as to destroy the vendor's right to retain, and so entitle the purchaser to sue in trover."² Mr. Benjamin, upon a review of the latest English cases, accedes in effect to the same views.³

The English rule, then, is, as enunciated by the latest cases, that to re-sell for the buyer's default in payment, after the property in the goods has legally passed to him, is, on the seller's part, a breach of contract. But what is allowable as damages for so doing? Nothing more than this: that if the buyer owes him for breach of contract, in making the re-sale, he recovers only the difference, if any, between the contract price and the market value of the goods on the re-sale; and if, as most likely happens, the re-sale value is no more than the contract price, or even less, nominal damages only can be recovered by the buyer.⁴ In other words, the seller makes

¹ 1 Sch. Pers. Prop. 507, 520.

² Blackb. Sales, 325.

³ Benj. Sales, bk. 5, pt. 1, c. 3; Griffiths v. Perry, 1 E. & E. 680.

⁴ Valpy v. Oakeley, 16 Q. B. 941; Griffiths v. Perry, 1 E. & E. 680.

his re-sale as a pledgee would, and under the liability to account to the buyer for any excess received above the contract price agreed upon. Nor are the seller's interests in such an emergency disregarded; for, as the buyer's default caused the trouble, the law permits the seller to sue for his full contract price, leaving the buyer to a cross-action for damages resulting from the re-sale, or to sue for his net loss on the re-sale.¹

Even if the seller pursues and tortiously retakes the goods from the buyer because of non-payment, this cannot be set up by the buyer in defence when sued for the price; for, supposing it established that there was no mutual rescission of the bargain by the parties, the seller's act of retaking the goods is not of itself a rescission of the bargain. The buyer must pay his price, and sue separately for the tortious retaking. "In point of law," says Parke, J., "the situation is this: the vendee has had all he was entitled to by the contract of sale, and he must therefore pay the price of the goods. He may bring trespass against the vendors for taking possession of them again, and may recover the actual value of the goods at the time they were taken."² And in 1866 Lord Chelmsford said, in *Page v. Cowasjee*: "There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price, after receiving express notice from the vendor, that, if he fail to do so, the goods will be re-sold. But the authorities are uniform on this point, that if before actual delivery the vendor re-sells the property while the purchaser is in default, the re-sale will not authorize the pur-

¹ *Maclean v. Dunn*, 4 Bing. 722; *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Page v. Cowasjee*, L. R. 1 P. C. 127.

² *Stephens v. Wilkinson*, 2 B. & Ad. 320. But as to presumptions where goods are retaken, see *Sloane v. Van Wyck*, 4 Abb. N. Y. App. 250.

chaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due. If this is the case where the possession of property sold remains with the vendor, *a fortiori* must it be so where there has been a delivery, and the vendor takes it out of the possession of the purchaser and re-sells it.”¹

But the original contract may have expressly reserved the seller's right to re-sell. It follows naturally, as to the seller, that, for loss on the re-sale under a power, his proper remedy is a special action for damages to recover the difference in price and the expenses; and as to the buyer, that, while thus answerable for possible loss upon the re-sale, he can take no profit in case the re-sale nets more than the price he had agreed to give.²

¹ Page v. Cowasjee, L. R. 1 P. C. 127.

² Lamond v. Duvall, 9 Q. B. 1030.

Mr. Benjamin submits the following as a summary of the English law on the subject: Benj. Sales, bk. 5, pt. 1, c. 3. (1st.) A re-sale by the seller on default of the buyer rescinds the original sale, when the right of re-sale was expressly reserved in the original sale; but not in the absence of such express reservation. (2d.) His remedy after re-selling under an express reservation of that right, against the defaulting buyer, is to sue in special damages for the loss of price, and expenses of the re-sale; and, if the goods fetch a profit on the re-sale, the buyer derives no benefit from it, except as showing, by way of defence, that his default has caused no damage to the seller. (3d.) The seller's remedy, after a re-sale made in the absence of an express reservation of that right, is *assumpsit* on the original contract, which was not rescinded by the re-sale. And in this action he may either recover as damages the actual loss on the re-sale composed of the difference in price and expenses; or he may refuse to give credit for the proceeds of the re-sale, and recover that whole price, leaving the buyer to a cross-action for damages for the re-sale. This rule prevails, even in cases where the seller has tortiously re-taken and re-sold the goods after their delivery to the buyer. (4th.) In the case of re-sale, a buyer in default cannot maintain *trover* against the seller, being deprived by his default of that right of possession without which *trover* will not lie. *Milgate v. Kebble*, 3 M. & G. 100. (5th.) A buyer, even if not in default, has no right to treat the sale as rescinded by reason of the seller's tortious re-sale; and cannot get back any part of the price paid, nor refuse

The American doctrine on this subject appears by no means elaborated; and the judicial disposition manifested in so many States to treat a sale, with respect to passing the property in the goods, as conditional upon payment of the price, simplifies the situation, and in every way strengthens the unpaid seller's means of enforcing his legal rights, so long as he holds possession. His right to sue for damages, of which we spoke in the last chapter, carries with it, according to most American authorities, large powers as to re-selling the goods or retaining them at a valuation.¹ Beyond this, the question of re-sale receives but slight attention. Says Chancellor Kent: "If the buyer unreasonably refuses to accept of the article sold, the seller is not obliged to let it perish on his hands, and run the risk of the solvency of the buyer. The usage, on the neglect or refusal of the buyer to come in a reasonable time, after notice, and pay for and take the goods, is for the vendor to sell the same at auction, and to hold the buyer responsible for the deficiency in the amount of sales."² To this quite general and positive statement of the seller's right of re-sale it might be added, that the later American

to pay the remainder when due. His only remedy is a cross-action in damages. (6th.) A buyer not in default may maintain trover against a seller who has tortiously re-sold; and the seller cannot have the unpaid price deducted from the damages, but must bring his cross-action. *Gillard v. Brittan*, 8 M. & W. 575. But if the seller is unable to maintain a cross-action for the price, then the buyer's recovery in trover will be limited to the actual damage suffered; namely, the difference between the market value of his goods which have been re-sold and the unpaid price. *Chinery v. Viall*, 5 H. & N. 288. (7th.) An unpaid seller, with the goods in his possession, has more than a mere lien on them: he has a special property analogous to that of a pawnee. But it is a breach of his contract to re-sell the goods, even on the buyer's default, for which damages may be recovered against him; but only the actual damage suffered,—that is, the difference between the contract price and the market value on the re-sale; and, if there be no proof of such difference, the recovery will be for nominal damages only.

¹ *Dustin v. McAndrew*, 44 N. Y. 72.

² 2 Kent Com. 504.

authorities establish no particular usage, but permit the seller to sell in any ordinary and reasonable manner upon fair notice to the defaulting party;¹ and, as we have already seen, the opinion prevails that he is not compelled to realize upon his security, where the property, and not the possession, has passed out of him, but may sue in damages for his full contract price,² leaving the buyer most probably to his cross-action with respect to the goods.

Both in England and America, the giving of a previous notice before selling over is thought desirable, if practicable, as evincing the good faith and prudence of the seller, and placing the blame more surely where it belongs. The tender of goods is a notice; and if the seller was not bound to tender, but to wait for the buyer to come and take the goods and pay for them, he may be acquitted of blame if he gives to the buyer express notice that he shall re-sell the goods if not at once paid for. But to sell over without some kind of notice will involve the seller in a breach of contract, nominal certainly, and which may prove serious, unless he can show that the buyer, and not he, was in default.³

It is held that the seller cannot maintain replevin for an article sold, delivered, and partially paid for, until after an offer to put the purchaser *in statu quo*, and a demand and refusal of the article.⁴ Nor, we may assume, would replevin lie in any case where the property in the chattel had passed from seller to buyer.⁵

¹ Conway v. Bush, 4 Barb. 564; Applegate v. Hogan, 9 B. Mon. 69; Gordon v. Norris, 49 N. H. 378; Sedgw. Damages, 5th ed. 313.

² Gordon v. Norris, 49 N. H. 378; *supra*, p. 555; Barr v. Logan, 5 Harring. 52.

³ *Ib.* See Lord Chelmsford, in Page v. Cowasjee, L. R. 1 P. C. app. 127; 2 Kent Com. 504, and *n.*; Sedgw. Damages, 5th ed. 316.

⁴ Hamilton v. Singer Man. Co., 54 Ill. 370.

⁵ See Bouv. Dict. "Replevin."

CHAPTER XIV.

SELLER'S LIEN, AND RIGHT OF STOPPAGE IN TRANSITU.

LIEN, and stoppage *in transitu*, are both to be reckoned as rights rather than remedies, though found serviceable in the event of the buyer's default, and prolonging one after the other, to the farthest possible limit, the seller's opportunity of making the goods sold a means of securing indemnity under the contract. Let us briefly consider the two topics in order.

I. Of liens generally we have elsewhere spoken.¹ Of liens, so called, under the law of sales, whereby the seller is enabled, as of right, to hold the goods as security for his price up to the moment when he parts possession, enough has been said to show that the word "lien" is not here quite aptly applied, and that the seller's remedy is rather analogous to that of a pawnee.² A few words may now be added as to the nature and extent of this lien as a right, how it is preserved, and under what circumstances it is finally lost.

Where the property in the goods has not passed out of the seller, it would be illogical to say that he has a lien upon them; for a lien upon goods implies that the property in the goods is in one, and the lien (which is founded in possession) in another; and the seller who has both property and possession needs no lien right in aid of his legal remedies. Hence the seller's price lien is well defined as a right midway between the conclusion of the bargain and the delivery of the subject-matter; the contract of sale meanwhile vesting in the buyer

¹ 1 Sch. Pers. Prop. 482 *et seq.*

² *Supra*, cs. 12, 13.

the property in the subject-matter, but giving the seller this right to keep possession for his proper security until he is paid.¹ In general, where goods are sold without stipulation for credit, the common law gives the seller a lien coextensive with his term of possession; and he need not part with his possession until he is paid.²

What does this lien of the seller cover? It is sometimes said to embrace the price and the charges.³ But recent English and American decisions appear to restrict it to the price; though incidental expenses, like transportation-charges or customs-duties, which are really payable by the buyer, under the contract of sale, along with the price, or as part of it, so to speak, would doubtless be still covered by the lien. These decisions oppose extending the original lien, however, to the seller's extra expenses incurred for his benefit by reason of the buyer's default; to such charges, in fact, as the buyer has never agreed to pay; but remit the seller to his personal remedy against the buyer, if a remedy exists at all. "I am clearly of opinion," says Lord Wensleydale, "that no person has by law a right to add to his lien upon a chattel, a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession."⁴

The parties may at the outset have excluded the seller's lien by the express terms of their bargain; and any special agreement which is inconsistent with the existence of such

¹ See Story Sales, §§ 281, 282; *Hammonds v. Barclay*, 2 East, 235; Shaw, C. J., in *Arnold v. Delano*, 4 Cush. 38; Benj. Sales, bk. 5, pt. 1, c. 4.

² Story Sales, § 282; *supra*, c. 13.

³ Story Sales, § 282.

⁴ *Somes v. British Empire Shipping Co.*, 1 E. B. & E. 353, 367; s. c. 8 H. L. Cas. 338; *Crommelin v. N. Y. & C. R. R. Co.*, 4 Keyes, 90; Benj. Sales, bk. 5, pt. 1, c. 4. See Lord Cranworth's remarks on appeal, in *Somes v. British Empire Shipping Co.*, *ib.*, as to the seller's personal right to recover irrespective of a lien claim.

lien bars it out.¹ This is a rule common to all liens;² but so favorably has the seller's price lien been regarded, that no mere stipulation for credit nor the taking of a negotiable security will irrevocably conclude the seller who is still in rightful possession of the goods when the credit expires.³ A stipulation for credit argues, nevertheless, a waiver of lien; and, if possession of the goods be surrendered under such agreement, there is an end of the seller's claim to hold them. Hence is it said that the seller waives his lien by giving credit, though taking a promissory note, bill of exchange, or other security, payable at a distant day; and, again, that if upon maturity of such obligation, or upon expiration of the credit, the seller still holds possession, his right of lien revives.⁴ Of the real force of such observations the reader is already enabled to judge.

We next ask, Up to what period does the seller's lien extend, so as to enable him to enforce payment against the goods? In general, so long as he holds possession of the goods, and no longer; until he or his agent has delivered them to the buyer or the buyer's agent, or until the buyer has put him at default by tendering payment.⁵

Whether delivery of part shall constitute a sufficient de-

¹ *Spartali v. Benecke*, 10 C. B. 212; *Story Sales*, § 285; *Benj. Sales*, bk. 5, pt. 1, c. 4. See *Outcalt v. Durling*, 1 Dutch. 443; *Pickett v. Bullock*, 52 N. H. 354.

² 1 Sch. Pers. Prop. 496.

³ *Supra*, p. 560; *Dixon v. Yates*, 5 B. & Ad. 341; *Story Sales*, § 290; *Bunney v. Poyntz*, 4 B. & Ad. 568; *Valpy v. Oakeley*, 16 Q. B. 941; *Southwestern Freight Co. v. Stanard*, 44 Mis. 71; *Milliken v. Warren*, 57 Me. 46; *Clark v. Draper*, 19 N. H. 419; *Arnold v. Delano*, 4 Cush. 33.

⁴ *Story Sales*, §§ 285, 286; *Benj. Sales*, bk. 5, pt. 1, c. 4; *Horncastle v. Farran*, 3 B. & A. 497; *Bunney v. Poyntz*, 4 B. & Ad. 568.

⁵ See *supra*, pp. 561, 563; 1 Sch. Pers. Prop. 494, 495; *Benj. Sales*, bk. 5, pt. 1, c. 4; *Arnold v. Delano*, 4 Cush. 38; *Southwestern Freight Co. v. Stanard*, 44 Mis. 71; 2 Kent Com. 509; *Taylor v. Wakefield*, 6 E. & B. 765; *Benj. Sales*, bk. 5, pt. 1, c. 4.

livery of the whole, so as to destroy the seller's lien, depends ultimately upon the true intent of the contract. The seller may, if he choose, it is said, give up part, and retain the rest; and then his lien will remain on the part retained in his possession for the price of the whole: but there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest; and then the delivery of part might operate as a delivery of the whole, and put an end to the seller's possession, and consequently to the lien.¹

Possession fraudulently obtained by the buyer cannot be set up against a seller who is reasonably prompt in asserting his rights; nor, of course, can his lien be destroyed against his will.² But even though the sale were stipulated to be for cash, yet the seller, by afterwards delivering the goods without receiving payment therefor, might be presumed to have waived his lien; and, wherever the goods are taken without his permission, he should be vigilant in following them up for retaking possession, and not suffer his rights to slumber.³ One's parol reservation of lien under a chattel sale, while he yields possession, has been denied force against third parties.⁴ Nor is a written instrument permitted to defeat the rights of such parties, which aims to create a seller's lien upon surrendered goods, and is not a chattel mortgage.⁵

The effect on the seller's lien of the transfer and indorsement to the buyer of what are called documents of title is

¹ Benj. Sales, bk. 5, pt. 1, c. 4; *Tanner v. Scovell*, 14 M. & W. 28. But see *Parke, J.*, in *Dixon v. Yates*, 5 B. & Ad. 313.

² See *Story Sales*, §§ 291-293.

³ See *Bowen v. Burk*, 13 Penn. St. 146; *Welsh v. Bell*, 32 Penn. St. 12.

⁴ *Gay v. Hardeman*, 31 Tex. 245. But see *supra*, p. 292 *et seq.*

⁵ *Obermeier v. Core*, 25 Ark. 562; *Shepardson v. Cary*, 29 Wis. 34. See *Haskell v. Rice*, 11 Gray, 240, as to standing wood carried from one lot to another of the seller's premises.

not unfrequently considered. Symbolical transfers of chattels not conveniently situated for manual delivery are effected by such acts under the law-merchant as the delivery of the bill of lading properly indorsed or assigned, or of an invoice as its substitute.¹ But all documents accompanying title have not this full effect so as to divest the seller's lien; nor will even the indorsement or assignment of a bill of lading (according to the latest decision) debar the owner of the right of stoppage *in transitu* where no third party's rights have intervened;² and as for an unindorsed or unassigned bill of lading, the delivery of the document will not be tantamount to delivery of the goods.³

¹ See Benj. Sales, bk. 5, pt. 1, c. 4; Story Sales, §§ 343-346; Conard v. Atlantic Ins. Co., 1 Pet. 386; Lickbarrow v. Mason, 2 T. R. 63; 1 Smith Lead. Cas. 848; McEwan v. Smith, 2 H. L. Cas. 309; 1 Sch. Pers. Prop. 605-607; Gibson v. Stevens, 8 How. 399; Gardner v. Howland, 2 Pick. 509, 602; McKee v. Garcelon, 60 Me. 167; The Vaughan, 14 Wall. 258; Dows v. Greene, 24 N. Y. 638.

² See, *post*, Lickbarrow v. Mason, 2 T. R. 63; 1 Smith Lead. Cas. 848. And see Peters v. Ballistier, 3 Pick. 495.

³ Stone v. Swift, 4 Pick. 389.

Of what are known as delivery-orders, Judge Blackburn has said that the indorsement of the instrument has no effect (independently of legislation) beyond that of an authority to receive possession. Blackb. Sales, 297. The later English cases confirm this view; and what are known as delivery-warrants, wharfinger's certificates, and the like, have been pronounced to be no documents of title representing the goods in any such sense, even with reference to third parties, as to suffice for carrying the complete property and possession out of the seller. Farina v. Home, 16 M. & W. 119; Story Sales, § 344; Gunn v. Bolckow, L. R. 10 Ch. 491; *supra*, p. 409; McEwan v. Smith, 2 H. L. Cas. 309. See Shepardson v. Cary, 29 Wis. 34. "If a bill of lading is given," says Lord Campbell, "and that is indorsed for a valuable consideration, that would take away the right of the vendor to prevent the delivery of the goods; but that is not so with a delivery-order. . . . It is said that the delivery-order and the subsequent payment of the price by the second vendee take away the lien of the vendors. These acts do not seem to me to do so; for, first, this price was not paid to the original owners; and then to treat what passed between other people as an estoppel to the original owners, is to give the delivery-order the effect of a bill of lading, and thus the argument

Since the seller may put an end to his lien by delivery, so may the buyer terminate it by fulfilling, or offering to fulfil,

again and again comes round to that point for which no authority in the usage of trade or in the law can be shown." *Per* Lord Campbell, *McEwan v. Smith*, 2 H. L. Cas. 309. And see Lord Ch. Cottenham, *ib.*

But local mercantile usage has much to do with these questions; and in the United States, and especially in sections largely concerned in inland transportation, warehouse-receipts have, in several instances, been treated as documents of title to much the same extent as bills of lading. *Gibson v. Stevens*, 8 How. 384; *Shepardson v. Cary*, 29 Wis. 34. Nor should the various acts of legislation in both countries be lost sight of, which, for certain specified purposes named, preserve or destroy liens, or give certain classes of these documents of title a *quasi* negotiable character by the force of positive law. Prominent among such enactments are the English Factors' Act of 6 Geo. IV., c. 94, § 2, and the Bills of Lading Act of 1849, Vict., c. 111, whose features reappear in the codes of some American States. See *Benj. Sales*, bk. 5, pt. 1, c. 4, where the English statutes on this subject are fully set forth; *Barber v. Meyerstein*, L. R. 4 H. L. 317; *Jessel v. Bath*, L. R. 2 Ex. 267; *Dows v. Greene*, 24 N. Y. 638; *Hale v. Milwaukee Dock Co.*, 29 Wis. 482. For the mutual convenience, besides, of owners who wish to secure advances upon collateral security, and the parties so advancing, may be found local statutes, as in New York, which specially provide that any person to whom warehouse-receipts are transferred by indorsement shall be deemed the owner, so far as to give validity to any pledge, lien, or transfer by him. *Benj. ib.*; *Yenni v. McNamee*, 45 N. Y. 614; N. Y. Laws 1858, c. 326. And the effect of the late English statutes is, in that country, to enable, not only, as formerly, the *bona fide* buyer of goods under indorsement of a bill of lading, but likewise a party, who loans or advances money upon the faith of such security, to prevail in title over the original seller who has actually transferred the document and suffered it to go into the market. *Benj. Sales*, bk. 5, pt. 1, c. 5; *Short v. Simpson*, L. R. 1 C. P. 248; *Barber v. Meyerstein*, L. R. 4 H. L. 317; *Pease v. Gloahec*, L. R. 1 P. C. 219. But independently of legislation, and of special usage shown, the general rule of America, and likewise of Great Britain, appears to be to preserve the seller's lien and possessory rights in goods, notwithstanding the transfer of orders, warrants, or other documents less formal than bills of lading.

One who buys or advances on the faith of these documents of title, does not, however, stand as securely as the innocent holder for value of a genuine bill of exchange or promissory note. Honest possession is not always an adequate protection in the instance of these merely *quasi* negotiable securities; for the indorsement gives the holder in general no such

his whole duty under the contract, and so entitling himself to delivery. Hence is it that the buyer's tender of price is held to extinguish the seller's lien, even though the seller refuse to receive the money; for the right is coextensive only with the object it aims to secure, and cannot be made the means of oppression.¹ But the lien right, Mr. Story says, is a right to retain until the whole price is paid; so that a partial payment will not destroy, but only diminish, the lien, every single portion of property sold being covered by the lien for the smallest fraction of the price.² To this it should be

right as to enable him to claim the goods when the bill came to him through a finder or thief who had no right to the document. *Gurney v. Behrend*, 3 E. & B. 622; *Blackb. Sales*, 279. And where the weight is wrongly expressed in the document, *Jessel v. Bath*, L. R. 2 Ex. 267, or where so many barrels of "salt pork" are therein described as "mess pork," *Hale v. Milwaukee Dock Co.*, 29 Wis. 482, the party who trusted to the document has been permitted to suffer; on the general ground, as it would appear, that unless legislation, usage, or express agreement, make it otherwise, nothing is to be delivered up under the document but the goods which the document actually represented, notwithstanding they were erroneously, but not fraudulently, misdescribed.

Where a bill of lading making the goods deliverable "to order or assigns" is transferred by the consignor and deposited as security for advances made by a third party, and then, upon repayment of the advance, is transferred back to him by the third party, his original remedies under the contract are restored, so as to enable him to sue for a breach committed before or after such re-transfer of the bill. *Short v. Simpson*, L. R. 1 C. P. 248.

A late decision in the English House of Lords treats of the effect of giving bills of lading in duplicate or triplicate, — a custom which largely prevails among merchants. It was held that the party who first gets one bill of lading out of the set gets the property which that set represents, and need not concern himself about the subsequent bills of the set; and that, while a ship-owner or wharfinger who delivers the goods to the holder of a subsequent bill may be excusable, the fact of such delivery will not affect the ownership of the goods as between the holders of the two bills. *Meyerstein v. Barber*, L. R. 4 H. L. 317 (1870). As to the seller's acts restraining the effect of delivery by exercising the *jus disponendi*, see *supra*, c. 4; *Craven v. Ryder*, 4 Taunt. 433; *Cowasjee v. Thompson*, 5 Moore P. C. 165.

¹ *Martindale v. Smith*, 1 Q. B. 389; *Benj. Sales*, bk. 5, pt. 1, c. 4.

² *Story Sales*, § 282. See *supra*, p. 582.

added, however, that in part payments, as well as part deliveries, the real intent of the contract will control; and several sales embraced under one entire contract must be, here as elsewhere, distinguished from separate and distinct transactions under as many distinct contracts.

II. The last chance which the law gives the unpaid seller to reclaim his goods as his own, under the original contract of sale, is presented where the goods are delivered up, technically speaking, to the buyer, so that the seller's lien is gone; and yet, being on their transit and in the keeping of an agent, have not yet come into the buyer's actual custody, but continue in that of the carrier or middleman. Here the seller, by a stretch of judicial favor, is permitted, on discovering that the buyer is insolvent, to stop the goods before the buyer acquires possession, and retake them as his own, instead of suffering them to be thrown in among the insolvent's assets. The right of stoppage *in transitu* is to be carefully distinguished from that of lien, to which in many respects it bears resemblance, and operates as a sort of extension thereof.

This right most likely originated in the law-merchant. It is not peculiar to Great Britain, but receives recognition in the other commercial countries of Europe, as France, Russia, and Holland; and the better opinion regards the rule as one of equity or civil jurisprudence.¹ The doctrine was first announced in England in 1690;² and, when equity inclined to abandon it, the common law took it up, and moulded it into its prevailing shape. But the right was generally conceded in the courts of England and the United States long before

¹ See *Gibson v. Carruthers*, 8 M. & W. 337, *per* Lord Abinger; *Wiseman v. Vandeputt*, 2 Vern. 203; *Story Sales*, §§ 318, 399; *Benj. Sales*, bk. 5, pt. 1, c. 5; *Lickbarrow v. Mason*, 2 T. R. 63; 2 Kent Com. 540; *Newhall v. Vargas*, 15 Me. 312. See *Black v. Bakers*, 40 Jur. 77 (1867), as to the Scotch law of stoppage *in transitu*.

² See *Wiseman v. Vandeputt*, 2 Vern. 203.

its consequences as to the respective parties found clear exposition.¹

Let us consider in order: (1st.) The parties by and against whom the right of stoppage *in transitu* may be exercised. (2d.) The transit, with its proper limits. (3d.) The method of exercising the right. (4th.) The effect of exercising the right. (5th.) How the right is defeated by the transfer of documents of title.

(1st.) As to the parties by and against whom the right may be exercised. This right is conceded, not only to a seller, but to any consignor who may have bought the goods on his own money or credit, and to whom the buyer may be liable for the price,—in other words, both to sellers and to parties situated as sellers, even though such selling party may be in a certain sense a factor or agent.² Among parties thus favored is the seller of an interest in an executory agreement; in fact, any general or special agent whose act is recognized and confirmed by the selling or consigning principal for whom he thus acts;³ but not a wholly unauthorized party, one who never had dealings with the seller, but stops the goods at a venture, as though bidding for the gratitude of a stranger.⁴ Legislation sometimes lets in a surety, so as to permit of his act of stoppage; but the liability of such a party, on general principle, appears too remote for this purpose.⁵ Nor

¹ Gibson v. Carruthers and other authorities, *supra*.

² Benj. Sales, bk. 5, pt. 1, c. 5, § 1; Story Sales, §§ 323, 324; Feise v. Wray, 3 East, 93; Ellershaw v. Magniac, 6 Ex. 570; Lickbarrow v. Mason, 2 T. R. 63, cases *infra*; 1 Smith Lead. Cas. 848 *et seq.*; Newhall v. Vargas, 13 Me. 93; Seymour v. Newton, 105 Mass. 272.

³ Jenkyns v. Usborne, 7 M. & G. 678.

⁴ See Story Sales, § 324; Benj. Sales, bk. 5, pt. 1, c. 5, § 1; Hutchings v. Nunes, 1 Moore P. C., n. s. 243; Bell v. Moss, 5 Whart. 189; Chandler v. Fulton, 10 Tex. 2; Aguirre v. Parmelee, 22 Conn. 473; Reynolds v. Boston, &c. R. R. Co., 43 N. H. 580; Bird v. Brown, 4 Ex. 786.

⁵ Siffkin v. Wray, 6 East, 371; Story Sales, § 323; Benj. Sales, bk. 5, pt. 1, c. 5, § 1, citing Act 19 and 20 Vict., c. 97, § 5.

can a mere lien creditor claim to exercise the right ; for it is the seller's lien only, not that of miscellaneous parties, whose protection is here regarded.¹ Nor can a buyer stop goods in transit, being the adversary party ; though it is allowable for a buyer to countermand the sale with the seller's assent, so as to restore to the latter his property-rights, save so far as some third party's rights may be injuriously affected thereby, — this being, in fact, a mutual rescission.²

A principal consigning goods to his factor who proves insolvent may stop them *in transitu*, even though the factor may have made advances, or be jointly interested in the goods.³ Nor is a consignor deprived of this right by reason of having in his own hands goods of the consignee still unaccounted for, while the account current between them remains unadjusted and the balance is unascertained.⁴ But the cases appear to pivot upon the inquiry, whether the party against whom the stoppage is made is still indebted to the stopping party as buyer or not ; the latter taking the benefit of a doubt. Hence is it that a partial payment of the price will not exclude one's right of stoppage ;⁵ nor a postponed payment in bills of exchange or other securities ;⁶ while the taking of securities or any commodity, by way of full and absolute payment of the price, does.⁷

¹ Story Sales, § 323 ; Benj. Sales, bk. 5, pt. 1, c. 5, § 1 ; 1 Sch. Pers. Prop. 484-500 ; Kinloch v. Craig, 3 T. R. 119 ; 4 Brown P. C. 47.

² See Story Sales, § 324, Bennett's *n.* ; Grout v. Hill, 4 Gray, 361 ; Sturtevant v. Orser, 24 N. Y. 538 ; Ash v. Putnam, 1 Hill, N. Y. 302. Cf. Bolton v. Lancashire, &c. R. R. Co., L. R. 1 C. P. 431 ; *post*, c. 17.

³ Benj. Sales, bk. 5, pt. 1, c. 5, § 1 ; Kinloch v. Craig, 3 T. R. 119 ; Newsom v. Thornton, 6 East, 17 ; Story Sales, § 323.

⁴ Wood v. Jones, 7 D. & R. 126. But see Vertue v. Jewell, 4 Camp. 31, explained in Benj. Sales, *ib.*

⁵ Feise v. Wray, 3 East, 93 ; Van Casteel v. Booker, 2 Ex. 702 ; Newhall v. Vargas, 13 Me. 93 ; Story Sales, § 327.

⁶ Dixon v. Yates, 5 B. & Ad. 345 ; Feise v. Wray, 3 East, 93. See *supra*, pp. 424-436.

⁷ Benj. Sales, bk. 5, pt. 1, c. 5, § 1 ; Eaton v. Cook, 32 Vt. 58 ; Story

The party against whom this right is to be exercised is the buyer, or *quasi* buyer, provided such party be bankrupt or insolvent. The insolvency of an intermediate party would give the original owner no right to stop the goods against one not insolvent, with whom he had dealt directly as seller.¹ Insolvency, or a general inability to pay one's debts, can be shown by a variety of circumstances; and one manifest instance is, where the buyer has stopped payment.² That the seller need not wait for a formal adjudication of bankruptcy, is quite clear; and, in case of uncertainty, he runs little risk by acting promptly as his welfare demands. For, if the buyer be insolvent by the time the goods reach their destination, the act of stoppage is justified; though, if he remained solvent to that period, the seller would be bound to deliver the goods, and indemnify the buyer besides.³ A Connecticut case goes so far as to declare that the buyer's failure must, in point of fact, have been later than the sale; a doctrine which, in other States, however, has been repeatedly disaffirmed;⁴ and the general inclination is undoubtedly to limit the inquiry to the point of actual insolvency on the buyer's part, unless it appears that the seller made the bargain with knowledge of the seller's insolvency, in which case the right would be denied him.⁵

Sales, § 327, charging a commission for negotiating paper taken by way of postponing payment, does not divest the seller of his right of stoppage; *Newhall v. Vargas*, 13 Me. 93. ¹ *Eaton v. Cook*, 32 Vt. 58.

² *Benj. Sales*, bk. 5, pt. 1, c. 5, § 2; *Story Sales*, §§ 327, 329; *Newson v. Thornton*, 6 East, 17; *Dixon v. Yates*, 5 B. & Ad. 313; *Clark v. Lynch*, 4 Daly, 83; *Herrick v. Borst*, 4 Hill, N. Y. 650; *Thompson v. Thompson*, 4 Cush. 127.

³ See *The Constantia*, 6 Rob. Ad. 321.

⁴ *Rogers v. Thomas*, 20 Conn. 54, disapproved by *Blum v. Marks*, 21 La. Ann. 268; *Benedict v. Schaettle*, 12 Ohio St. 515; *Reynolds v. Boston, &c. R. R. Co.*, 43 N. H. 580; *O'Brien v. Norris*, 16 Md. 122; *Hays v. Mouille*, 14 Penn. St. 48.

⁵ *Blum v. Marks*, 21 La. Ann. 268; *Conyers v. Ennis*, 2 Mason, 236; *Reynolds v. Boston, &c. R. R. Co.*, 43 N. H. 580; *O'Brien v. Norris*, 16 Md. 122; *Buckley v. Furness*, 15 Wend. 137.

(2d.) As to the transit, with its proper limits. To allow of the right of stoppage *in transitu*, there must be, besides those adversely interested as buyer and seller, a third party, — namely, the carrier or middleman in possession of the goods, — acting in one sense as the buyer's agent, but, in truth, a sort of neutral custodian. When he takes possession from the seller as carrier, the transit begins; when he divests himself of possession in such capacity to the buyer, the transit ends; and the stoppage, to be effectual, must occur between these two points.¹ It must appear at the outset, so far as the seller's right of stoppage is concerned, that the custodian for the transit is not retained as the seller's agent, as would be the case if the seller reserved the *jus disponendi* to himself by certain acts, and thus kept himself owner of the goods; nor as the buyer's special and immediate agent, taking and holding custody strictly on his behalf, and subject to his directions; but as the buyer's agent only so far as the law thus treats a carrier or middleman.²

The transit ordinarily continues until the goods are actually delivered to the buyer, or to some one whom he designates as his authorized agent to receive the goods on his behalf; and this is usually, but not invariably, postponed to the arrival of the goods at the journey's end. Supposing the transit to require a change of carriers pending the arrival at the ultimate destination, — as where goods *en route* from Chicago to London pass over different lines of railway, and then require shipment by vessel besides, — the transit may be broken at various points, and the goods may lie over in warehouses, awaiting opportunities to go forward. Now, the main ques-

¹ Benj. Sales, bk. 5, pt. 1, c. 5, § 3; Story Sales, § 336.

² *Ib.*; *Van Casteel v. Booker*, 2 Ex. 691; *Turner v. Liverpool Docks Co.*, 6 Ex. 543; *Schotsman v. Lancashire, &c. R. R. Co.*, L. R. 2 Ch. 332; 2 Kent Com. 545; Blackb. Sales, 242; *Berndston v. Strang*, L. R. 4 Eq. 481; L. R. 3 Ch. 639; *Rowley v. Bigelow*, 12 Pick. 307; *Covell v. Hitchcock*, 23 Wend. 611; *Cabeen v. Campbell*, 30 Penn. St. 254; *Newhall v. Vargas*, 15 Me. 312.

tion as to every intermediate agent is, whether he is the buyer's agent to keep the goods, and take the buyer's new orders as to their further disposal and a new destination ; or, on the other hand, an agent for the purpose of carrying out the original forwarding intent.¹ In the former case, and where some fresh impulse must be given to the goods, the seller's right of stoppage has ceased : in the latter it continues. A certain point being reached, where the goods come into the hands of parties who await new orders from the original buyer to forward to his own sub-buyer or another, or where they go back again to the original seller to start them under new directions from the buyer, the first transit has been deemed at an end.² Not so, however, where the intermediate custody is incidental to the continuous purpose of forwarding to the ulterior point of destination determined upon,³ even though the buyer's further directions are awaited as to details in furtherance of that purpose.⁴ As preliminary to the main transit, the goods may be so warehoused for temporary purposes, or placed in such neutral custody, by virtue of the seller's undertaking to forward them to the buyer, that the seller must be deemed to have either his original lien upon them, or a right of stoppage *in transitu*, for security of the price.⁵

The issue herein involved, which is one of intent, though often obscure because manifested by equivocal acts, is rendered all the more doubtful in the cases, from the circumstance, now readily admitted, that a buyer has the right to

¹ See 2 Kent Com. 545.

² Blackb. Sales, 224, 244; Benj. Sales, bk. 5, pt. 1, c. 5, § 3; Dixon v. Baldwin, 5 East, 175; Valpy v. Gibson, 4 C. B. 837; Smith v. Hudson; 4 B. & S. 431; Sawyer v. Joslin, 20 Vt. 172; Guilford v. Smith, 30 Vt. 49.

³ Benj. ib.; Story Sales, §§ 334-336; Coates v. Railton, 6 B. & C. 422; Covell v. Hitchcock, 23 Wend. 611; Cabeen v. Campbell, 30 Penn. St. 254; Hays v. Mouille, 14 Penn. St. 48; Markland v. Creditors, 7 Cal. 213.

⁴ Harris v. Pratt, 17 N. Y. 249.

⁵ Mohr v. Boston, &c. R. R. Co., 10 Mass. 67.

break the original transit and intercept his goods, personally or by means of an authorized agent, at any intermediate point. His exercise of this right in good faith and with corresponding intent puts an end to the seller's opportunity of stopping the goods on his own behalf.¹ Carrier and consignee may agree, too, to change the route and vary the place of delivery, and thus shut out the right of stoppage, provided the seller has parted title;² nor will a wrongful refusal of the carrier to deliver impair the buyer's right to take full control.³

As to the termination of the transit, the simple arrival of the goods at the place of ulterior destination does not *per se* put an end to the seller's right of stoppage; but he may overtake them at any time before the buyer has acquired possession. Such acts of the carrier as entering at the custom-house do not put the goods into the buyer's possession; nor partially unloading, and then putting them on board again;⁴ and he might even deliver a portion, and yet leave the seller free to stop the remainder.⁵ Nor would the buyer acquire possession so as to defeat the seller's lien by merely marking the goods, going on board and touching them, taking samples, or performing other symbolical acts, where something more explicit is called for;⁶ while on the other hand,

¹ *Whitehead v. Anderson*, 9 M. & W. 518; *London, &c. R. R. Co. v. Bartlett*, 7 H. & N. 400; *Mohr v. Boston, &c. R. R. Co.*, 106 Mass. 67; *Chandler v. Fulton*, 10 Tex. 2.

² *London, &c. R. R. Co. v. Bartlett*, *supra*; *Wood v. Yeatman*, 15 B. Mon. 270.

³ *Bird v. Brown*, 4 Ex. 786; *Benj. Sales*, bk. 5, pt. 1, c. 5, § 3; *Blackb. Sales*, 259.

⁴ *Northey v. Field*, 2 Esp. 613; *Mottram v. Heyer*, 5 Denio, 629; *Harris v. Pratt*, 17 N. Y. 249; *Donath v. Broomhead*, 7 Penn. St. 301. But warehousing the goods might have this effect. *Ib.*; *Guilford v. Smith*, 30 Vt. 49. And see *Parker v. Byrnes*, 1 Low. 539; *Crawshay v. Edes*, 1 B. & C. 181.

⁵ *Crawshay v. Edes*, 1 B. & C. 181; *Buckley v. Furniss*, 17 Wend. 504; *Story Sales*, § 332; *Benj. Sales*, bk. 5, pt. 1, c. 5, § 3.

⁶ *Whitehead v. Anderson*, 9 M. & W. 518; *Story Sales*, § 338.

by taking the goods into his personal custody or that of his exclusive agent, whether before the transit begins, or midway, or at the end, he assumes an entire control of possession in such a sense as utterly extinguishes the seller's right to stop them as his own.¹

What most embarrasses in this connection is to state the precise point at which the transit ends where the carrier has finished the transportation, and yet holds the goods in his keeping ; for he might, upon this state of facts, prove, not a carrier still, but a mere warehouseman or custodian for the buyer. Such a case must turn, ultimately, upon the facts presented ; but the modern tendency is to presume that the transit continues for the seller's benefit, in absence of clear testimony showing that buyer and carrier have come to some mutual understanding for a change in the character of the latter's possession, so as to leave him a carrier no longer. Thus the seller's right of stoppage has been upheld, notwithstanding the buyer went personally on board the vessel on its arrival, or sent his lighter, to get the goods, the captain excusing himself from delivering for one cause or another.² Nor does the carrier's notification to the buyer that the goods have arrived conclusively end the transit.³ So, with reference to railroad and other inland carriers, the seller's right of stoppage has been protected against attaching creditors of the buyer after the goods were transferred from the train to the freight dépôt.⁴ But, if the carrier once converts himself into

¹ *Bolton v. Lancashire, &c. R. R. Co.*, L. R. 1 C. P. 431 ; *James v. Griffin*, 1 M. & W. 20 ; *Naylor v. Dennie*, 8 Pick. 198 ; *Covell v. Hitchcock*, 23 Wend. 611 ; *Hays v. Mouille*, 14 Penn. St. 48 ; *Story Sales*, § 333 ; *Benj. Sales*, bk. 5, pt. 1, c. 5, § 3 ; 2 Kent Com. 545.

² *Whitehead v. Anderson*, 9 M. & W. 518 ; *Coventry v. Gladstone*, L. R. 6 Eq. 44. And see *Jackson v. Nichol*, 5 Bing. N. C. 508.

³ *Seymour v. Newton*, 105 Mass. 272.

⁴ *Calahan v. Babcock*, 21 Ohio St. 281 ; *Seymour v. Newton*, 105 Mass. 272.

a warehouseman for the buyer by virtue of some contract or course of dealing with him, the transit is ended.¹

While the buyer or his assignee hesitates or refuses to take the goods, the transit of necessity continues, so as to entitle the seller to stop them;² but the buyer's hesitation avails nothing if he finally takes possession while the seller's right slumbers.³ The right of terminating the transit and taking possession of the goods passes, if the buyer dies, to his executor or administrator,⁴ or, if he has gone into bankruptcy, to his assignee,⁵ to be exercised by such representative as the buyer himself might have done.

(3d.) As to the method of exercising the right of stoppage. No particular method is prescribed by law; and the only thing requisite is, that, during the transit, the seller shall, by some act or declaration plain enough for a carrier to comprehend its import, countermand delivery to the buyer. For, to use the oft-repeated expression of Lord Hardwicke, the vendor is so much favored as to be justifiable in getting his goods back, by any means not criminal, before they reach the possession of an insolvent vendee.⁶ But the stoppage on the seller's account must, in order to be effectual, be made on his own behalf in assertion of his paramount right to the goods.⁷

The usual mode of stopping the goods is by notifying the

¹ *Sawyer v. Joslin*, 20 Vt. 172; *Hoover v. Tibbitts*, 13 Wis. 79; *Covell v. Hitchcock*, 23 Wend. 611; *Bolton v. Lancashire, &c. R. R. Co.*, L. R. 1 C. P. 431.

² *Bolton v. Lancashire, &c. R. R. Co.*, *supra*; *Grout v. Hill*, 4 Gray, 361; *Sturtevant v. Orser*, 24 N. Y. 538; *Benj. Sales*, bk. 5, pt. 1, c. 5, § 3.

³ *Greaner v. Mullen*, 15 Penn. St. 200.

⁴ *Connyers v. Ennis*, 2 Mas. 233.

⁵ *Ellis v. Hunt*, 3 T. R. 467; *Inglis v. Usherwood*, 1 East, 515.

⁶ 1 Atk. 250.

⁷ *Benj. Sales*, bk. 5, pt. 1, c. 5, § 4; *Blackb. Sales*, 266; *Story Sales*, § 325.

carrier or middle-man, who holds possession, of the seller's claim thereto, forbidding delivery to the buyer, and requiring that the goods be held subject to the seller's further orders. This notice should be given, if possible, to the person already or presently in actual custody of the goods, as the master of the ship or a railroad freight-agent ; and, if only to the principal party engaged in the transportation, then in season sufficient for him to transmit the proper orders to his agent which shall overtake the goods ; the main object being, that notice shall be brought to the custodian concerned in the transit soon enough to enable him to act upon the seller's countermand.¹ The effect of such notice, seasonably given and sufficiently plain in expression, is to revest the seller's possession and lien ; and the carrier is bound to obey, leaving the justification of the stoppage with the seller as concerns the sale parties ; since the due exercise of this right is at the seller's, and not the carrier's, peril. The carrier is not to disregard the seller's claim, nor to undertake to solve the dispute between buyer and seller, nor to ask for evidence of the right ; but to obey the seller's order implicitly, and thereupon refuse delivery to the buyer.² It is only when he is sure that the seller's right must fail of exercise that he can safely disregard the notice ; and even here, though practically right, he is theoretically wrong, because of his disobedience to orders : nor, in general, will the carrier's delivery, despite of the countermand received, balk the seller of his rights under the stoppage.³

¹ *Whitehead v. Anderson*, 9 M. & W. 518 ; *The Tigress*, 32 L. J. Adm. 97 ; *Meyerstein v. Barber*, L. R. 4 H. L. 317 ; *Benj. Sales*, bk. 5, pt. 1, c. 5, § 4 ; *Story Sales*, § 325 ; *Seymour v. Newton*, 105 Mass. 272 ; *Newhall v. Vargas*, 13 Me. 93.

² *Litt v. Cowley*, 7 Taunt. 168 ; *The Tigress*, 32 L. J. Adm. 97.

³ *Litt v. Cowley*, 7 Taunt. 168 ; *Benj. Sales*, bk. 5, pt. 1, c. 5, § 4 ; *Story Sales*, § 325. See *Ex parte Walker*, cited *Benj. Sales*, bk. 5, pt. 1, c. 5, § 4, as to the seller's stoppage by entering the goods in his own name at the custom-house.

(4th.) As to the effect of exercising the right. It appears to be now well established, both in England and in the United States, that as the seller's stoppage *in transitu* may be exercised by simply serving notice upon the carrier, so its effect is, not to rescind the sale, but to restore the goods, so to speak, to the consigning party, and put him in possession again, with the rights of an unpaid seller to hold until he is paid.¹ Upon this ground, that there is still a privity of contract and not rescission, courts of equity take jurisdiction.² The right of the buyer, on the one hand, to obtain the goods upon promptly paying up, and of the seller, on the other, to re-sell upon notice and after a reasonable delay, as on the buyer's account, follow the principles already laid down with regard to the unpaid seller's lien for price; with only the addition of costs and expenses incidental to the stoppage, seriously diminishing the buyer's chance of a balance.³ Hence it is held that the seller need not refund a part payment received on the goods before enforcing his right,⁴ nor tender back the purchaser's notes given conditionally for the price of goods;⁵ and the proceeds of the goods being applied, if re-sold, to the seller's recompense, he must account to the buyer for whatever may remain in his hands, or, in case of a deficiency, may pursue the ordinary remedies of a creditor against the buyer for the balance.⁶ On the whole, the respective remedies of

¹ Story Sales, § 320; Benj. Sales, bk. 5, pt. 1, c. 5, § 6; Wentworth v. Outhwaite, 10 M. & W. 436; Martindale v. Smith, 1 Q. B. 389.

² See Lord Cairns in Schotsman v. Lancashire, &c. R. R. Co., L. R. 2 Ch. 332.

³ Story Sales, § 320; Benj. Sales, bk. 5, pt. 1, c. 5, § 6; 2 Kent Com. 541; cases *infra*; Cross v. O'Donnell, 44 N. Y. 661.

⁴ Newhall v. Vargas, 13 Me. 93; 15 Me. 312.

⁵ Hays v. Mouille, 14 Penn. St. 48.

⁶ Newhall v. Vargas, 15 Me. 312; Story Sales, § 320. And see Stanton v. Eager, 16 Pick. 475. But it is held that the right of stoppage as to goods taken in a vessel chartered by the buyer does not extend so far

the parties under a stoppage, although not very clearly settled by decisions, are adjusted on the principle that the sale parties stand substantially as though the seller had not parted possession when the transit commenced.

The seller's right of stoppage *in transitu* for his price is paramount to that of attaching creditors to attach ; and hence, though the goods be attached while on their transit by creditors of the buyer, the seller may exercise his right before the transit ends with the usual effect, and the attachment must yield to his claim.¹ So, too, is this right of a higher nature than any general claim of the transporting party ; and stoppage *in transitu* will accordingly supersede the carrier's or warehouseman's lien for any general balance against the buyer, but not for his special charges upon the particular goods.²

(5th.) How the right is defeated by the transfer of documents of title. The only mode of defeating the seller's right of stoppage *in transitu*, as yet legally recognized, appears to be a *bona fide* transfer for value to a third party of the bill of lading, or perhaps, under the influence of late legislation, certain other documents of title of a like *quasi*-negotiable character.³ As between the original sale parties, the buyer's possession of the bill of lading, in advance of the arrival of

as to entitle the seller, as against the buyer's other creditors, to claim insurance money which accrues to the buyer because of damage done to the goods in transit. *Berndston v. Strang*, L. R. 3 Ch. 588. And as to a buyer's claim for freight and charges in transportation on his ship, see *Newhall v. Vargas*, 15 Me. 312.

¹ *Story Sales*, § 321 ; *Smith v. Goss*, 1 Camp. 282 ; *Benj. Sales*, bk. 5, pt. 1, c. 5, § 1 ; *Seymour v. Newton*, 105 Mass. 272 ; *Clark v. Lynch*, 4 Daly (N. Y.), 83 ; *Chandler v. Fulton*, 10 Tex. 2 ; *O'Brien v. Norris*, 16 Md. 122 ; *Wood v. Yeatman*, 15 B. Mon. 270 ; *Blum v. Marks*, 21 La. Ann. 268.

² *Story Sales*, § 321 ; *Oppenheim v. Russell*, 3 B. & P. 42 ; *Benj. Sales*, *supra*. See *Mercantile, &c. Bank v. Gladstone*, L. R. 3 Ex. 233.

³ *Supra*, p. 583 and *n*.

the goods, can have no greater effect than to give him the property in the goods, without depriving the seller of his right to stop them on the way.¹ But with the transfer of these documents of title a new party comes into view, who holds the assigning party's rights; and it has long been settled law, that this assignee, if a *bona fide* transferee for valuable consideration, may claim the goods as his own, divested altogether of the seller's right of stoppage.² The transferee who could thus hold against the first seller was formerly thought to be, of necessity, a sub-purchaser of the goods; and such is still the general rule, save where legislation (as under the English factors acts) has extended the privileges of *bona fide* holders for value to parties who loan or advance money on security of the goods.³ But there remains still this difference between the transferee of a bill of lading by way of sale and the transferee by way of pledge or mortgage, that in the former instance the seller's right is wholly defeated, while in the latter the seller can stop the goods and retain all interest in them over and above discharging the transferee's security.⁴

The *bona fides* of such transferee's title is material. He might know that the goods were not paid for, and yet take the instrument in good faith; since goods are bought on credit as well as for cash. But if he knows the goods are not paid for, and besides that the original buyer is insolvent and cannot pay for them, or other circumstances are brought home to him showing that the bill of lading is not honestly

¹ *Fraser v. Witt*, L. R. 7 Eq. 64; *Stanton v. Eager*, 16 Pick. 474.

² *Lickbarrow v. Mason*, 2 T. R. 63; *Benj. Sales*, bk. 5, pt. 1, c. 5, § 5; *Story Sales*, § 344; 2 Kent Com. 547, 548; *Pease v. Gloahec*, L. R. 1 P. C. 219; *Coventry v. Gladstone*, L. R. 6 Eq. 44; *Conard v. Atlantic Ins. Co.*, 1 Pet. 445; *Winslow v. Norton*, 29 Me. 421; *Dows v. Greene*, 24 N. Y. 638; *Chandler v. Fulton*, 10 Tex. 2.

³ *Story Sales*, § 347; *Benj. Sales*, bk. 5, pt. 1, c. 5, § 5; *supra*, p. 584, n.

⁴ *In re Westzinthus*, 5 B. & Ad. 817; *Spalding v. Ruding*, 6 Beav. 376; *Berndston v. Strang*, L. R. 4 Eq. 486, n.; *Chandler v. Fulton*, 10 Tex. 2.

assignable by the buyer, he cannot by taking it exclude the seller from exercising his right of stoppage.¹ A transferee of the bill in trust for creditors of the insolvent buyer must yield, therefore, to the unpaid seller.² The latest English cases go so far in exacting scrupulous dealings as even to uphold the unpaid seller against any creditor who takes a transfer of the bill of lading from his debtor in consideration of merely releasing some antecedent claim :³ but the American rule is not so strict ; and in this country, apparently, one might actually take an assignment in this way, and yet be a *bona fide* purchaser for value.⁴

¹ Story Sales, § 345 ; Benj. Sales, bk. 5, pt. 1, c. 5, § 5 ; Cuming v. Brown, 9 East, 506 ; Salomons v. Nissen, 2 T. R. 681 ; Vertue v. Jewell, 4 Camp. 31.

² Harris v. Pratt, 17 N. Y. 249.

³ Rodger v. Comptoir d'Escompte, L. R. 2 P. C. 393.

⁴ See Lee v. Kimball, 45 Me. 172, and cases cited.

CHAPTER XV.

BUYER'S REMEDIES.

THERE are three leading instances in which the buyer of chattels finds occasion to invoke his remedies under the sale contract: (1st) where the seller fails altogether to deliver; (2d) where delivery is made or tendered, but the thing is not, in kind or quality or quantity, what was bargained for; (3d) where the delivery is unreasonably late. The remedies suitable in these three instances will be separately considered.

(1st.) Where the seller fails altogether to deliver, the common remedy is by a personal action against the seller for damages caused by his breach of the contract; and the measure of damages is, in general, the difference between the price contracted for and the market price of the goods at the time when and the place where delivery was due. This is the declared rule of England and America.¹ Even if it appears that the goods could have been bought for less than the price agreed on at the time and place of delivery, the buyer will recover nominal damages; since every breach of contract imports some damage at law, though no actual damage in fact can be shown.²

¹ Benj. Sales, bk. 5, pt. 2, c. 1, § 1; Sedgwick Damages, 5th ed. 289-340; Story Sales, §§ 430, 431, 448; Barrow v. Arnaud, 8 Q. B. 604-609; Boorman v. Nash, 9 B. & C. 145; Chinery v. Viall, 5 H. & N. 288; Wilson v. Lancashire, &c. R. R. Co., 9 C. B. N. s. 632; Bartlett v. Blanchard, 13 Gray, 429; Northrup v. Cook, 39 Mis. 202; McHose v. Fulmer, 73 Penn. St. 365; Furlong v. Polleys, 30 Me. 491; Dana v. Fiedler, 12 N. Y. 40; Gordon v. Norris, 49 N. H. 376; Thompson v. Woodruff, 7 Coldw. 401; Jemmison v. Gray, 29 Iowa, 537.

² Valpy v. Oakeley, 16 Q. B. 941; Griffiths v. Perry, 1 E. & E. 680; Deere v. Lewis, 51 Ill. 254.

The main object of the law in awarding damages is to make the injured party whole ; and, in the present case, the loss to be made up is, as nearly as possible, what it must have cost the buyer to go promptly into the nearest market and procure the same kind of chattels from some one else. Hence it is not the wholesale price at the place of delivery that we measure by, but the retail price, if the buyer can only procure the goods in the market at retail.¹ The goods which nearest approximate in market value those ordered have sometimes sufficed as the standard, even though somewhat higher priced ;² and, if there be no market price at the precise place of delivery, the nearest practicable market, with the enhanced expenses of transportation thence, may be taken into account ; the injured party being always supposed to do like any other judicious buyer under the same circumstances.³ But, if it be absolutely impossible to obtain the article in market, the actual loss naturally sustained by the buyer must be computed in some other way.⁴ On an agreement to deliver chattels on demand, the market value at the time of demand is the general rule of damages.⁵ If transportation be from a distance, and the seller in default, we reckon as between the total cost and market price at place of due arrival, not at the foreign place, in many instances.⁶ And, in general, where a given place is fixed upon as the place of delivery under the contract, the inquiry as to market prices is limited to that place, or, at all events, starts out from it ; while the ascertainment of such price is peculiarly for the jury to determine upon all the circumstances.⁷

¹ *Haskell v. Hunter*, 23 Mich. 305.

² *Hinde v. Liddell*, L. R. 10 Q. B. 265.

³ *Haskell v. Hunter*, 23 Mich. 305 ; *Sedgw. Damages*, 5th ed. 310 ; *Pearce v. Carter*, 3 Houst. 385 ; *Furlong v. Polleys*, 30 Me. 491.

⁴ *McHose v. Fulmer*, 73 Penn. St. 365. But see *Jemmison v. Gray*, 29 Iowa, 537.

⁵ *Smith v. Berry*, 18 Me. 122 ; *Eastern Railroad v. Benedict*, 10 Gray, 212.

⁶ See *Heinemann v. Heard*, 4 Thomp. & C. (N. Y.) 666.

⁷ *Sedgw. Damages*, 5th ed. 310 ; *Worthen v. Wilmot*, 30 Vt. 555 ; *Phelps v. McGee*, 18 Ill. 155.

But the rule above stated, though a convenient method of giving the buyer full indemnity in most cases, is not inflexible; and, while the Roman law in this respect was more lax than our own, the common law permits the assessment of special damages, such as the parties may reasonably be thought to have understood would follow the breach, besides the general damages naturally resulting; or, as it is said, full compensation for the injury of not having the very thing at the time and place at which it should have been delivered.¹ Hence the estimated profits, lost by the seller's delay, of some chattel, like a ship or a steam-engine, whose keeping is a valuable interest, are sometimes reckoned as special damages, the more so if nothing ready-made can be at once procured in its place, or only an inferior article; and to these might be added special costs thrown upon the buyer, like freight and insurance.² Even where the buyer, in order to fill out his sub-contract, has been obliged, because of his seller's delay, to procure somewhat higher-priced goods in the market as the best he could do, the extra cost has been allowed him, supposing he acted prudently, and made no special profit out of his customer by so doing.³ This is a principle which affects the whole law of contracts. While, however, a special case will be favorably regarded according to the facts presented, it would appear that, in general, the seller must reasonably have apprehended such a loss to follow his own breach. Some notice of the exceptionable circum-

¹ *Cutting v. Grand Trunk R. R. Co.*, 13 Allen, 381, *per* Gray, J.; *Hadley v. Baxendale*, 9 Ex. 341-354; *Sedgw. Damages*, 5th ed. 289.

² *Ib.*; *Fletcher v. Tayleur*, 17 C. B. 21; *Smeed v. Foord*, 1 E. & E. 602; *British Columbia Saw-Mill Co. v. Nettleship*, L. R. 3 C. P. 499; *Griffin v. Colver*, 16 N. Y. 489; *Mossmere v. N. Y. Shot Co.*, 40 N. Y. 422; *Benj. Sales*, bk. 5, pt. 5, c. 1, § 1; *Jervis, C. J.*, in *Fletcher v. Tayleur*, 17 C. B. 21; 25 L. J. C. P. 65; *McHose v. Fulmer*, 73 Penn. St. 365; *Wolcott v. Mount*, 7 Vroom, 262; *Heinemann v. Heard*, 4 Thomp. & C. (N. Y.) 666; *Story Sales*, §§ 412, 452; *Borries v. Hutchinson*, 18 C. B. N. s. 445.

³ *Hinde v. Liddell*, L. R. 10 Q. B. 265.

stances, if any existed, ought to have reached him in season to charge him personally, as upon his acceptance of the special terms, and this more especially in the case of articles readily procurable in general market.¹ The damages actually paid to one's sub-buyer for failure of the sub-sale are too remote for a test.² Nor can the buyer, who intended to use the chattel for a special purpose, recover loss of profits as for that particular purpose, where the seller supposed it intended for another and more obvious purpose.³ The price fixed by a written contract is not to be varied by parol evidence showing the special circumstances under which it was made, for the purpose of increasing damages.⁴ Nor can the buyer recover for matters incidental to procuring the bargain.⁵

Where the buyer has paid in advance for the article, some of the older cases incline to give him as damages for non-delivery the best price he could have got at any time up to the trial;⁶ but the later and better authorities, so far as they throw light upon the subject, are against permitting payment in advance to affect the rule, unless it be to justify the allowance of interest on the sum actually paid.⁷

The case of breach by the seller, where the bargain was for delivery by instalments, has not as yet been largely discussed. In the absence of evidence on the defaulting seller's part that the buyer could have gone into market and obtained a similar contract on such terms as to lessen the loss, it is held that the measure of damages is the sum of the differences

¹ Cf. *Williams v. Reynolds*, 6 B. & S. 495; *Randall v. Roper*, E. B. & E. 84; *Fox v. Harding*, 7 Cush. 516. See *Horne v. Midland R. R. Co.*, L. R. 7 C. P. 583; L. R. 8 C. P. 131; *Story Sales*, § 412.

² *Borries v. Hutchinson*, 18 C. B. N. s. 445. And see *Penn. R. R. Co. v. Titusville, &c. Co.*, 71 Penn. St. 350.

³ *Cory v. Thames Ironworks Co.*, L. R. 3 Q. B. 181.

⁴ *Brady v. Oastler*, 3 H. & C. 112.

⁵ *Stevens v. Lyford*, 7 N. H. 360.

⁶ See *Sedgw. Damages*, 5th ed. 292 *et seq.*

⁷ *Sedgw. Damages*, 304; *Hill v. Smith*, 32 Vt. 433.

between the market price and the contract price at the several periods of delivery.¹ Inasmuch as the seller's positive refusal to perform may give the buyer the right to sue at once as for a repudiated contract, it may thus happen that suit is brought for a breach before the time fixed for a final delivery; the effect of which is, not to modify the rule of damages, but to leave the jury to estimate the differences of price under future deliveries as well as they can.² But sale contracts of this character sometimes provide expressly for the payment of penalties in default of prompt deliveries; and, in general, the dates for partial computation may depend entirely upon a construction of the particular contract.³ It is a rule, that, where the breach is only partial, damages are to be assessed for the partial and not for an entire breach.⁴

Where no time of delivery was expressly or by implication fixed in the contract of sale, the buyer should, in general, demand the goods before bringing suit. But there are circumstances under which a demand would be useless.⁵ So, too, where the broken contract provided for delivery to the buyer "on request," the buyer must, as a condition precedent to maintaining his remedy, make this request personally, or by message or letter, in conformity with the mutual understanding; though here, too, the requirement might be dispensed with, where the circumstances show a waiver, and the formal request would be an idle and useless formality.⁶ If the sale was for cash on delivery, the buyer

¹ *Brown v. Muller*, L. R. 7 Ex. 319; *Roper v. Johnson*, L. R. 8 C. P. 167; *Ex parte Llansamlet Tin Plate Co.*, L. R. 16 Eq. 155.

² *Ib.* See *Frost v. Knight*, L. R. 7 Ex. 111; *Burtis v. Thompson*, 42 N. Y. 246.

³ *Bergheim v. Blaenavon Iron Co.*, L. R. 10 Q. B. 319; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473.

⁴ *Benj. Sales*, bk. 5, pt. 2, c. 5, § 1; *Simpson v. Crippin*, L. R. 8 Q. B. 14; *Story Sales*, §§ 448, 451; *Haines v. Tucker*, 50 N. H. 307; *supra*, p. 306.

⁵ *Story Sales*, § 453.

⁶ *Ib.*; *Benj. Sales*, bk. 5, pt. 2, c. 1, § 1; *Bach v. Owen*, 5 T. R. 409; *supra*, p. 288.

ought to be able to show that he was ready at the time to receive and pay for the goods upon request.¹

While assumpsit for damages may always be brought for the seller's non-delivery, the buyer's right, in case the property in the goods has been transferred to him through the operation of the sale contract in constituting him the owner, is enlarged to a choice of remedies. Instead of letting the goods go, and seeking his money-recompense, he may, to a certain extent, insist on getting the goods, and enforcing his claims of ownership. Specific performance is thus an equitable remedy to which the buyer has been allowed to resort, where the subject-matter of sale was an incorporeal chattel, such as shares of stock, or something rare and of marked intrinsic value if corporeal, as a statue, a painting, or an antique vase, and the buyer, with the right of possession in himself, could not be made whole by going to law for damages.² This equitable remedy, so useful in these days, where the seller of real estate shirks his engagements, is sometimes enlarged as to things personal by local statute.³ But otherwise, whether dead or only sleeping, it has thus far been of little avail in chattel sales; the assumption being, apparently, that one who buys corn and other articles of ordinary mercantile traffic, with a market price, is well enough off when he can go and buy something similar, and hold his defaulting seller liable for the difference. The civilians appear to have differed in opinion as to whether the seller of goods could be compelled to deliver.⁴

Trover, too, is maintainable by the buyer where the property in the goods has passed to him. But, in thus suing on the tort for non-delivery of the goods, he recovers no greater

¹ *Metz v. Albrecht*, 52 Ill. 491.

² 2 Kent Com. 487; *Falcke v. Gray*, 4 Drew. 658; *Benj. Sales*, bk. 5, pt. 2, c. 1, § 2; *Story Sales*, § 413.

³ *Benj. ib.*, citing English Act 19 and 20 Vict., c. 97, § 2 (1856).

⁴ *Story Sales*, § 413.

damages than he could have done on the contract;¹ and where, under the contract, the right of possession continues in the seller, — as in the case of his retention of the goods, with a lien upon them, until the balance of the purchase-money shall be paid over, — it is he, and not the buyer, who can sue a third party for their wrongful conversion.²

(2d.) Where delivery is made or tendered, but the thing is not, in kind or quality or quantity, what was bargained for. The cases are here in great confusion, and the buyer's choice of remedies differently stated in different local jurisdictions. This comes from the irreconcilable views entertained in England and parts of the United States as to making distinctions between condition and warranty; the controversy being as to the buyer's right of refusing or rejecting the goods.³

The English rule, as we have already shown, discriminates, so as to permit a buyer to refuse the goods offered, in the former case, because the seller has fundamentally failed to perform as promised, — as in sending him tea where he ordered coffee; but not in the latter case, — as where coffee is sent, but of an inferior quality to that ordered, — because the failure goes only to a collateral matter. This presupposes, however, that the property in the goods ordered has already passed to the buyer; and that, in one way or another, the minds of the parties have met upon an identical subject-matter. The English rule is, that the buyer's obligation to accept depends on the seller's obligation to deliver; that where unascertained and uninspected goods are ordered on the faith of the seller's judgment, so as to leave the buyer necessarily to inspect for himself, not at the time of the contract, but at or about the

¹ Benj. Sales, bk. 5, pt. 2, c. 1, § 2; *Chinery v. Viall*, 5 H. & N. 288; *Story Sales*, §§ 413, 431.

² *Lord v. Price*. L. R. 9 Ex. 54.

³ *Supra*, pp. 319, 362.

time of delivery, he may demand a reasonable time to make up his mind whether the goods offered are such as he bargained for, and, if they are not, to return them.¹ If the contract of sale contain some condition authorizing a return in an emergency, that condition is to be respected; and a special agreement of the parties may modify rules, an executory contract suspending the transfer of the property in the chattel. But where the minds of the parties have met upon specific goods, and there is neither fraud nor express reservation of a right to return, the general rule of England is, that special stipulations of quality are to be taken as collateral to the contract or as matter of warranty, and that the buyer may not refuse to receive the goods for any such breach of warranty, but must rely on other remedies.² And the favorite determining test would appear to be, that the property in such goods has unconditionally passed to the buyer under the contract; though some incline to treat it rather as a simple question between a contract for "any goods" of a description and a contract for specific goods, absolutely denying the buyer the right to refuse or reject in the latter instance.³

In certain parts of this country, the English rule as to the buyer's right of rejection appears to prevail, though not, perhaps, with an equally manifest disposition to discriminate between condition and warranty. It seems to be regarded as settled in New York (though perhaps not necessarily determined in any case) that the buyer has no right to return

¹ *Benj. Sales*, bk. 5, pt. 2, c. 2; 2 *Smith Lead. Cas.* 26, 27. And see *Lord Chelmsford*, as to sample sales, in *Couston v. Chapman*, L. R. 2 Sc. App. 250.

² *Benj. Sales*, bk. 5, pt. 2, c. 1, § 2; *Street v. Blay*, 2 B. & Ad. 456; *Dawson v. Collis*, 10 C. B. 530; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Mondel v. Steel*, 8 M. & W. 858.

³ *Ib.* See *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447, and opinions of Cockburn, C. J., Blackburn, J., and Lush, J., criticised in *Benj. Sales*, bk. 5, pt. 2, c. 1, § 2.

goods for warranty in quality, unless there was fraud in the sale, or some express contract conferred the right to do so.¹ While this certainly holds true of an executed present sale of chattels, there is more doubt as concerning an executory sale;² and, in fact, the general distinction seems to be properly taken, as in England, between specific ascertained goods and unascertained goods to be made or supplied to order.³ But in many of the United States the rule is declared to be, that, to avoid circuity of action, a warranty may be treated as a condition subsequent at the election of the seller, who is accordingly entitled, upon the seller's breach thereof, to rescind the contract and return the goods. This is the rule of Massachusetts,⁴ of Maryland,⁵ of Iowa,⁶ of Maine,⁷ and of other States.⁸

¹ *Day v. Pool*, 52 N. Y. 416 (Church, C. J., Allen and Andrews, JJ. diss.).

² *Rust v. Eckler*, 41 N. Y. 488; *Day v. Pool*, *supra*; *Parks v. Morris, &c. Co.*, 54 N. Y. 586.

³ See *Lawton v. Keil*, 61 Barb. 558; *Messmore v. N. Y. Shot, &c. Co.*, 40 N. Y. 422. And see *Lyon v. Bertram*, 20 How. 149; *Story Sales*, § 455.

⁴ *Dorr v. Fisher*, 1 Cush. 271; *Bryant v. Isburgh*, 13 Gray, 637; *Morse v. Brackett*, 98 Mass. 209.

⁵ *Hyatt v. Boyle*, 5 Gill & J. 121.

⁶ *Rogers v. Hanson*, 35 Iowa, 283.

⁷ *Marston v. Knight*, 29 Me. 341.

⁸ See *Jagers v. Griffin*, 43 Miss. 134; *Ralph v. Chicago, &c. Co.*, 32 Wis. 177; *Youghioghenny Iron Co. v. Smith*, 66 Penn. St. 340; *Dill v. Ferrell*, 45 Ind. 268; *Butler v. Northumberland*, 50 N. H. 33.

We have elsewhere shown that goods unascertained must, up to a point, consistently with the rule of *caveat emptor*, prove satisfactory when tendered to the buyer, — as, for instance, like a sample previously agreed upon, or merchantable under the description; and thus far, if the thing prove not satisfactory, the buyer ought to refuse acceptance and promptly return it, and not be bound to keep an inferior article for an inferior price. But as to specific and ascertained goods already agreed upon, *caveat emptor* will often oblige one to keep an inferior article for an inferior price; and even if a collateral warranty were specially given, that should not entitle the buyer to send the goods back if the sale were *bona fide*. That the buyer has no right to refuse goods tendered him, even though the property therein had not already passed, on any mere allega-

The confusion still prevalent in the cases under this head appears to result from the uncertain meaning of "warranty," and the dim apprehension with which collateral representation and fundamental undertaking are still viewed in the courts, and especially those of this country.

But a prompt return of the goods is exacted from the buyer, wherever the right to return exists: he must, under a *bona fide* sale which accords him no special privilege, make up his mind forthwith, having had whatever opportunity to ascertain the character of the goods was rightful, and decide whether to keep or return them; and, deciding to return them, he must act without delay upon the decision. If, by his acts and conduct, in consuming an unreasonable time for inspection, or in exercising acts of ownership, or in expressing his satisfaction, or in making no complaint to the seller, he justifies the legal conclusion that he must have accepted the chattels, his right to reject and return them is gone.¹

On the other hand, where the buyer, with this right of return, refuses the article delivered promptly, as by tendering it to the seller, notifying him to take it away, and consistently stands to his decision of non-acceptance, he is relieved of liability for the price; or, if he has already paid, he may sue to recover the payment back.² He has even been allowed, in

tion that they are unsatisfactory to him, is clear, so long as the goods are, in fact, a satisfaction of the contract. Nor, as to chattels *bona fide* tendered, whether under a bargain relating to specific goods or to fulfil some order, — in other words, relating to unascertained goods, — ought the buyer to have a right (independently of the express agreement of the parties) to return the goods, after he has had every chance to inspect or test them which the contract contemplated, and has once fairly accepted them; otherwise the effect would be to suspend indefinitely the execution of the contract, and put it into the buyer's power to use, and possibly damage, the goods, and then throw them back upon the seller.

¹ Benj. Sales, bk. 5, pt. 2, c. 2; 2 Kent Com. 480; Story Sales, § 455; Fielder v. Starkin, 1 H. Bl. 17; Mondel v. Steel, 8 M. & W. 858; McCormick v. Sarson, 45 N. Y. 265; Gilson v. Bingham, 43 Vt. 410.

² Ib.; Grimoldby v. Wells, L. R. 10 C. P. 391; Hall v. Etna Co., 30 Iowa, 215.

case the seller refuses to take the goods so tendered, to sell them at the best price obtainable, and make himself whole.¹ If the seller positively refuses to take the chattel back, the buyer is excused from making any effort to return it.² But, like the seller in a corresponding situation, the buyer should use reasonable prudence with reference to the article, both as to sending it back and in disposing of it, and not act in headlong disregard of the seller's interests. In case of non-acceptance for cause, the buyer has been permitted to claim the reimbursement of the freight and transportation expenses to which he has been put, and not only to demand a settlement of the same before giving up possession of the rejected goods, but, upon the seller's neglect to reimburse him within a reasonable time after notice given, to sell what may be suitable to make him whole.³

Whatever may be the buyer's position as concerns his right to reject and return the subject-matter sold, he need not take this course, but may at his option keep the goods, and resort to a money compensation in damages for the seller's breach of express or implied warranty of quality. The course by remedy in damages resolves itself into a choice between these two methods: (1st.) To set off against the unpaid seller's claim for price the damages sustained by himself because of the inferiority of the article delivered. (2d.) To bring his separate action for the breach. The former is the most convenient, where the goods are not yet paid for; but as the remedy here does not go beyond defeating the seller's claim upon an initiative suit, the buyer must resort to the

¹ *Youghiogheny Iron Co. v. Smith*, 66 Penn. St. 340; *Barnett v. Terry*, 42 Geo. 22; *Messmore v. N. Y. Shot, &c. Co.*, 40 N. Y. 422; *Gifford v. Betts*, 64 N. C. 62; *Jagers v. Griffin*, 43 Miss. 13.

² *Padden v. Marsh*, 34 Iowa, 522; *Story Sales*, § 457.

³ *Barnett v. Terry*, 42 Geo. 283; *Gifford v. Betts*, 64 N. C. 62. As to circumstances under which the buyer may sue a carrier for losing the goods, see *Ralph v. Chicago, &c. R. R. Co.*, 32 Wis. 177.

latter method wherever his case calls for a more ample indemnity.¹

It is not necessary for the buyer, in pursuing either method, to give the seller notice before thus defending or suing;² and while the rule appears to be, that, by keeping the chattel, the buyer makes himself still accountable for its price upon a just abatement for the breach, it has been held in both England and America that the buyer may be relieved from paying any part of the price if he can show that the goods were utterly worthless, notwithstanding he has failed to return or offer to return them.³ To support the claim of a partial failure of consideration, no such offer is needed.⁴ If the buyer has offered to return the goods for the breach, so much the plainer, of course, is his right to choose as between rescinding with a rejection of the goods and claiming damages while leaving the contract to stand. But, if the facts show acceptance, he has no right to rescind the contract: his claim of damages is his only resort.⁵ Even though it was expressly agreed by the seller, as part of the original bargain, that the article might be returned if it did not fulfil the contract, the better opinion is that the buyer may sustain himself in his claim of damages, without sending the article back because of its failure to suit.⁶ But an incorporeal chattel, like stock,

¹ See *Mondel v. Steel*, 8 M. & W. 858; *Davis v. Hedges*, L. R. 6 Q. B. 687.

² *Benj. Sales*, bk. 5, pt. 2, c. 2; *Story Sales*, §§ 451, 455; *Kellogg v. Denslow*, 14 Conn. 411; *Muller v. Eno*, 14 N. Y. 597; *Fielder v. Starkin*, 1 H. Bl. 17; *Day v. Pool*, 52 N. Y. 416; *Lyon v. Bertram*, 20 How. 149; *Vincent v. Leland*, 100 Mass. 432; *Butler v. Northumberland*, 50 N. H. 33; *Rogers v. Hanson*, 35 Iowa, 283.

³ *Poulton v. Lattimore*, 9 B. & C. 259; *Perley v. Balch*, 23 Pick. 283; *Dill v. Ferrell*, 45 Ind. 268.

⁴ *Day v. Pool*, 52 N. Y. 416; *Vincent v. Leland*, 100 Mass. 432; *Raspberry v. Moye*, 23 Miss. 320; *McCormick v. Dunville*, 36 Iowa, 645.

⁵ *Thornton v. Wynn*, 12 Wheat. 183; *Lyon v. Bertram*, 20 How. 149; cases *supra*.

⁶ *Douglass, &c. Co. v. Gardner*, 10 Cush. 88; *Head v. Tattersall*, L. R. 7 Ex. 7; *contra*, *Adams v. Richards*, 2 H. Bl. 573. And see *Aultman v. Theirer*, 34 Iowa, 272.

must be dealt with somewhat differently; and it is held, that where the seller, upon delivering the certificate, agreed that he would take it back and return the price if requested, the buyer may recover the price without tendering the certificate, but must surrender up the certificate or file it in court before execution can issue.¹

Where the buyer undertakes to set off his loss by the seller's breach against the unpaid seller's claim for price, he stands on the defensive, with the advantages and disadvantages incidental to this position. The seller has the burden of the suit; while the buyer need only show how much less than what is claimed by the plaintiff he ought to pay in consideration that the article failed in quality to come up to the standard as warranted. He gains to the extent of abating or completely offsetting the seller's demand sued upon. He loses so far as his own claim of damages may justly exceed that demand.² But he is not without further

¹ *George v. Braden*, 70 Penn. St. 56.

Whether the one or the other remedy for money compensation be pursued, the burden of proof is on the purchaser to show that the article supplied did not correspond with the warranty. *Dorr v. Fisher*, 1 Cush. 271. But the seller's knowledge of the bad quality need not, of course, be shown, so long as the issue is not one of fraud and bad faith, but of simple breach of contract. See *Williamson v. Allison*, 2 East, 446; *Bartholemew v. Bushnell*, 20 Conn. 271; *Massie v. Crawford*, 3 Monr. 218; *Tyre v. Causey*, 4 Harring. 425. And as a defence against the seller's suit for his price, evidence which fails to prove a rescission of the sale may nevertheless be available to reduce damages. *Morse v. Brackett*, 98 Mass. 205. A variance between the declaration and proof should be material, and not formal merely, to prevent the buyer from recovering in his suit for breach. *Phelan v. Andrews*, 52 Ill. 486. But as torts and contracts are clearly distinguishable as the basis of suits, an allegation of false representation is inconsistent with proof of mere breach of warranty; and, while tort appears to have been the ancient form of suing for false warranty, *assumpsit* is the modern. *Ib.*; *Massie v. Crawford*, 3 Monr. 218; *Cooper v. Landon*, 102 Mass. 58. As to action for false representation, see c. 17, *post*.

² *Mondel v. Steel*, 8 M. & W. 858; *Walker v. Hoisington*, 43 Vt. 608; *Hitchcock v. Hunt*, 28 Conn. 343; *Westcott v. Rims*, 4 Cush. 215; *Story Sales*, § 455.

remedy; for it may be generally asserted that the buyer's action for damages resulting from the seller's breach is not barred by his having been allowed an offset on the seller's action for the price, save to the amount of such allowance.¹ Where a seller obtains judgment for his full price in a foreign State by default of the buyer, the latter is not thereby estopped from bringing his special action for damages on the breach.² It would appear, however, that if in one suit the full performance was the matter in clear issue, and was there tried and settled, it is not open to be tried again.³ And upon this ground, where the seller recovered a judgment for the balance of his price, payable under a special contract, without express warranty, to manufacture a certain article to order, the buyer was not permitted to bring a new action of breach upon the same defect which he had alleged in defence of the former suit, and concerning the merits of which the former adjudication was complete.⁴ Nor, as it has been distinctly ruled, can a buyer, who deliberately intends to claim damages for the breach in excess of the seller's demand upon him, first defend against the seller by way of set-off to the full extent of this remedy, and then bring his action for the balance which he claims; for, as the court gains nothing towards furthering justice by allowing set-off in one action if a cross-action must eventually be brought, the buyer is properly excluded from pursuing a double advantage against the seller.⁵

There is a growing tendency in American courts to simplify litigation, and get rid of the old circuities which drove parties to their separate common-law suits over the same

¹ See Parke, B., in *Mondel v. Steel*, 8 M. & W. 858.

² *Bascom v. Manning*, 52 N. H. 132. And see *Bodurtha v. Phelon*, 13 Gray, 413.

³ *Bascom v. Manning*, *supra*; *Davis v. Tallcot*, 12 N. Y. 184.

⁴ *Gilson v. Bingham*, 43 Vt. 410.

[5] ⁵ *Gilson v. Bingham*, *ib.*; *O'Conner v. Varney*, 10 Gray, 231; *Starr Glass Co. v. Morey*, 108 Mass. 573.

transaction or an identical course of dealing. Hence we find that in many States the buyer is now permitted to set off his own damages incurred through the seller's breach of warranty, notwithstanding the suit is brought on his negotiable security for the price, provided the seller, or a party who took it from the seller when overdue, be the owner thereof; or, in other words, unless the buyer's paper is in the hands of some party with equities of his own, irrespective of the sale parties.¹ But the former rule, and one still prevalent in England, is, that the buyer cannot defend for breach of warranty where suit is brought, not on the sale, but on the negotiable security, inasmuch as no unliquidated and uncertain claim can be set up against a liquidated and certain demand; the consequence of which is, that the buyer is driven to his separate action for damages.²

Where the buyer seeks to make the seller's breach of warranty of quality his special cause of action, he may do so; and how far this remedy is still open to him, notwithstanding his choice of other remedies affording but a partial relief, we have just seen. To bring his own suit for damages sustained in the nature of a cross-action to the seller's suit for his price was formerly the regular means of procedure; but though the compensation it awards the plaintiff is found adequate, its chief objection is found in forcing a party unnecessarily out of his stronghold to make a pitched battle. The right of one party to sue for damages occasioned by the other's failure to perform is incidental to contracts of all kinds.³

¹ *Perley v. Balch*, 23 Pick. 283; *Mooklar v. Lewis*, 40 Ind. 1; *Goodwin v. Morse*, 9 Met. 278; *Rasberry v. Moyer*, 23 Miss. 320; *Hill v. Southwick*, 9 R. I. 299; *Coburn v. Ware*, 30 Me. 202. Local statutes may aid in establishing such practice. See *Butler v. Northumberland*, 50 N. H. 33.

² *Agra, &c. Bank v. Leighton*, L. R. 2 Ex. 56; *Benj. Sales*, bk. 5, pt. 2, c. 2.

³ See *Mondel v. Steel*, 8 M. & W. 858; *Story Sales*, § 454; *Benj. Sales*, bk. 5, pt. 2, c. 2.

The measure of damages recoverable for breach of warranty of quality is, in general, the difference in value between the article actually furnished and that which should have been furnished under the contract at the time and place agreed upon.¹ Thus, in an English case where Manilla hemp was imported, and afterwards found damaged, the court ruled that the buyer should recover the difference between the actual value of the hemp when it arrived and what would have been its value if shipped in a suitable state.² So, where suit is brought on the warranty of an animal's soundness, the same test applies.³ Such reasonable expenses as the buyer has incurred in consequence of the breach may be added in making up the estimate.⁴ But special, punitive damages, such as interest from the date of the writ, cannot be recovered.⁵ As to time, place, and other circumstances, the rule is not essentially different from that already applied to the case of non-delivery.⁶ If the article actually sold were thus valueless, the thing which should have been delivered will be set at its full value without deduction;⁷ and, while the agreed price aids in the estimate of what the agreed thing to be delivered was worth, it is manifestly no arbitrary standard, but only a *prima facie* test of value, since the bargain might have been better or worse for either party, and yet the very article as warranted should have been delivered.⁸

¹ Sedgw. Damages, 5th ed. 318; Jones v. Just, L. R. 3 Q. B. 197; Benj. Sales, bk. 5, pt. 2, c. 2; Story Sales, §§ 449, 454, 455; Whitmore v. South Boston Iron Co., 2 Allen, 52; Muller v. Eno, 14 N. Y. 597; Moulton v. Scruton, 39 Me. 287; Howie v. Rea, 70 N. C. 559; Merrimack Man. Co. v. Quintard, 107 Mass. 127.

² Jones v. Just, L. R. 3 Q. B. 197.

³ Moulton v. Scruton, 39 Me. 287.

⁴ Murry v. Meredith, 25 Ark. 164; Furlong v. Polleys, 30 Me. 491.

⁵ Moulton v. Scruton, 39 Me. 287.

⁶ See Furlong v. Polleys, 30 Me. 491; *supra*, p. 601.

⁷ Mooklar v. Lewis, 40 Ind. 1.

⁸ See Reggio v. Braggiotti, 7 Cush. 166; Tuttle v. Brown, 4 Gray, 457; Brown v. Sayles, 27 Vt. 227; Muller v. Eno, 14 N. Y. 597; Merrimack Man. Co. v. Quintard, 107 Mass. 127.

Here too, as in non-delivery, the buyer may recover, not only for the direct and natural consequence of the seller's failure to perform according to agreement, but for such damages besides as both parties might reasonably be supposed to have foreseen, at the time of the contract, would flow from such breach.¹

Supposing the buyer to have made a sub-sale of the defective goods whose quality was warranted: if he has done so with a like warranty, the sum paid on a judgment recovered against him by the sub-buyer for the same breach is *prima facie* evidence of the amount to be recovered as special damages on his own suit.² To this should be added the taxable costs of the sub-buyer's suit, if the first buyer gave his own seller due notice and afforded him a chance to defend the action, though not the counsel fees incurred in his own defence;³ for the law means to cover in such damages under a sub-sale as result from the first seller's breach. But, in general, there is no privity of damage between the original seller and the sub-buyer, as there is none of contract; and the first buyer may recover for the breach of the first seller's undertaking, upon the usual reckoning of damages and without diminution, notwithstanding he has sub-sold the goods, and his sub-buyer has made no claim upon him for their defective quality; and even though, by the terms of the sub-sale, no corresponding right of action is conferred upon the sub-buyer.⁴ The price

¹ *Ib.* And see *Phelan v. Andrews*, 52 Ill. 486; *Wolcott v. Mount*, 7 Vroom, 262; *Furlong v. Polleys*, 30 Me. 491.

Where the case is one of exchange, rather than of sale for a price, evidence of value may not be confined to the warranted chattel; but it is admissible to show the value of the chattel given in exchange, as tending to show what would have been the warranted chattel's value if as warranted, where the parties do not appear to have settled at the time of exchange the value of either the one or the other chattel. *Chaplin v. Warner*, 23 Wis. 448.

² *Reggio v. Braggiotti*, 7 Cush. 166; *Randall v. Raper*, E. B. & E. 84.

³ *Lewis v. Peake*, 7 Taunt. 153; *Reggio v. Braggiotti*, 7 Cush. 166.

⁴ *Muller v. Eno*, 14 N. Y. 597; *Brown v. Bigelow*, 10 Allen, 242.

at which the goods were sub-sold may be evidence tending to show the amount of damages ; but it does not furnish the decisive test.¹

Where suit is brought on an entire contract for the sale of goods to be delivered at stated times by instalments, upon the buyer's premises and at the buyer's expense, the measure of damages for the inferior quality of the goods delivered is the difference between the value of what was delivered on the buyer's premises and what the contract with its warranty called for. The ordinary rule applies, subject to such modifications as a fair interpretation of the peculiar contract may justify.²

The buyer may, by failing to inform his seller in season after discovering the defect, and thereby depriving him of his own reasonable rights, lose his remedy upon the breach of warranty.³ But the question of waiver, upon whatever state of facts presented, must be fairly determined by the evidence.⁴ An agreement to take back the goods if found inferior, and give others in exchange, is not uncommon ; but the assent of both parties to such a means of rectifying an error must be established in order that it may operate.⁵

¹ *Ib.* ; *Medbury v. Watson*, 6 Met. 257.

² *Merrimack Man. Co. v. Quintard*, 107 Mass. 127; *supra*, p. 603.

It is laid down that the buyer who defends in the seller's suit for his price of goods sold and delivered, and at the same time sues in damages for breach of warranty in his cross-action, is not entitled to have the damages assessed in both actions for the same breach of contract, nor to divide his claim for damage as he may see fit between the two suits, so as to set off the two executions. But the entire damages for his breach must be applied, first, to discharge the contract price due under the seller's suit for the goods sold and delivered. If the buyer's damage exceeds that balance, the excess will be returned in a verdict for him in the cross-action ; but, if not, the verdict in the cross-action should be for the seller. Execution for costs will issue accordingly. *Starr Glass Co. v. Morey*, 108 Mass. 573.

³ *Hall v. McEwen*, 19 Mich. 95.

⁴ *Merrimack Man. Co. v. Quintard*, 107 Mass. 127.

⁵ *Woodward v. Libby*, 58 Me. 42 ; *O'Donnell v. Allen*, 6 Allen, 106.

Breach of warranty of title may be at the foundation of the buyer's suit, instead of breach as to quality. The purchaser of a chattel whose title has failed may either sue the party who warranted for the return of his price, or bring his action for damages on account of the breach.¹ But when the third party, claiming to be the true owner, makes his demand upon such purchaser in possession, the latter should call upon the party from whom he purchased to make him whole, or to intervene and defend the suit;² and it is held that only nominal damages can be recovered for the breach, where the buyer has suffered no actual damage in the matter.³ In case the title fails to only a portion of the goods, the buyer is not bound to rescind the contract *in toto*, but may retain that to which the title is secure, and have his damages under the warranty, either by set-off upon the seller's suit for his purchase-money, or by his own action for the loss of the residue.⁴

(3d.) Where the delivery is unreasonably late. The remedies already noticed here apply, *mutatis mutandis*; the question for the buyer's decision, upon a tender, being, whether to refuse the goods, or to receive them and claim damages for the injury resulting to himself from the delay.⁵ If the latter course, he should make his method of receiving possession such as to show the other party that he does not waive his rights: for receiving goods without objection is, *prima facie*, a waiver on his part of the right to claim damages for the delayed delivery; while it is otherwise when they are received with an explicit statement that such damages will be

¹ Benj. Sales, bk. 5, pt. 2, c. 2; Story Sales, § 407; Eichholz v. Banister, 17 C. B. N. S. 708; *supra*, p. 381 *et seq.*

² Burt v. Denny, 40 N. Y. 283; Parker v. Nolan, 37 Tex. 85.

³ Burt v. Denny, 40 N. Y. 283.

⁴ McKnight v. Devlin, 52 N. Y. 399. See Story Sales, § 407.

⁵ See Story Sales, § 450; *supra*, p. 424.

claimed.¹ Where the seller is behindhand in a contract for delivery by instalments, the disposition is to go by the fair interpretation of the particular contract; which may sometimes require computation from the dates of the respective periods of delivery, but is sometimes to be construed with reference to the date of final completion.²

¹ *Merrimack Man. Co. v. Quintard*, 107 Mass. 127.

² See *Bergheim v. Blaenavon Iron Co.*, L. R. 10 Q. B. 319; *Merrimack Man. Co. v. Quintard*, 107 Mass. 127. The doctrines discussed in this chapter are largely applicable to carriers and others, as well as to selling parties, when at default in making delivery under a contract. See *Bailments*, *post*.

CHAPTER XVI.

SALES INVOLVING ERROR AND FRAUD.

HAVING gone over the general ground of Private Sales of Personal Property, showing what are the constituent parts of such contracts, how they are executed, how far a compliance with the Statute of Frauds is indispensable to their proper enforcement, and the respective remedies of seller and buyer for non-performance according to the mutual intent, we come, at length, to consider those special causes of avoidance which are embraced under the respective heads of, I. Error; II. Fraud; III. Illegality; and IV. Mutual Rescission. The doctrines here applied are those of contracts in general with such modifications as the peculiar contract of sale requires. Of the first two causes in the present chapter, and the remaining two in our next.

I. Avoidance by reason of error. Error or mistake is, in legal phrase, an unintentional deviation from the truth, as distinguished from fraud; and this innocence of purpose, carried into a sale contract, justifies the law in permitting the contract to be avoided where the one innocent party may be left in as advantageous a position as the other.

But, in order that a remedy so exhaustive may be successfully invoked, it is, first of all, indispensable that the mistake should be a substantial one, or going to a fundamental point. If the two parties honestly misunderstood one another as to the subject-matter or the price, the error is fundamental and material. Thus, where an annuity is sold dependent on a life which has already ceased without either party's being

aware of it, this is cause of avoidance;¹ so is a claim upon a party which has already been paid off.² This holds true in every case where there is a common mistake as to the existence of the thing to be sold, and it does not, in fact, exist.³ So may the mistake be as to quantity, if the price depended upon the quantity: for there is a distinct failure of consideration; as, for instance, where a bar of silver is sold by weight, as reckoned by the assayer, and the assayer proves to have weighed inaccurately, so that there was much less silver in the bar than the price went upon.⁴ So may the mistake be one of kind: as in a sale by description, where an article of a certain kind is requested, and that of another kind sent; kind, or matters of essential description or condition precedent under a contract, requiring distinction from collateral description or matters of mere quality.⁵ So a mistake may arise, fatal to a sale, where the one party reasonably meant the transfer of an article as a sale, while the other as reasonably considered it a loan or a gift.⁶ A mutual mistake as to price is a mistake of substance; though, manifestly, it is the seller who is injured by supposing a larger price, and the buyer by supposing a smaller one.⁷ And mistake as to the genuineness of a thing — as where a negotiable instrument is sold, purporting to have signatures which turn out false, or professing to be in kind what it is not, and even as it is held where accommodation notes are sold for business notes⁸ — goes to the substance; for the consideration fails.⁹ Any

¹ *Strickland v. Turner*, 7 Ex. 208.

² *Allen v. Hammond*, 11 Pet. 63.

³ See *Ketchum v. Bank of Commerce*, 19 N. Y. 502; *Story Sales*, § 149; *Benj. Sales*, bk. 3, c. 1.

⁴ *Cox v. Prentice*, 3 M. & S. 244. And see *Scott v. Warner*, 2 Lans. 49; *supra*, p. 202.

⁵ *Supra*, pp. 319, 362. And see *Morse v. Brackett*, 98 Mass. 205.

⁶ *Story Sales*, § 150.

⁷ *Story Sales*, § 153.

⁸ *Webb v. Odell*, 49 N. Y. 583.

⁹ *Burchfield v. Moore*, 3 E. & B. 683; *Westropp v. Solomon*, 8 C. B. 345; *Story Sales*, § 148; *supra*, pp. 322, 383.

failure of the buyer's title amounting to a failure of consideration may furthermore be regarded as a matter of substance, subject to the limitations which we have elsewhere pointed out.¹

But where a mistake occurs merely as to the quality of the article sold, this is not so essential as to vitiate the sale; and it follows, from our previous chapters, that there must have been a warranty of quality on the seller's part, or actual fraud, to enable the buyer to resist successfully.² In the absence of warranty, it is said a buyer cannot escape from the obligation of his contract solely because he is disappointed in the quality of the article.³ So, too, the brand on the exterior of barrels of flour is said not to be of the substance of the contract, where purchase was made of a cargo of flour; though we apprehend there may be cases where the brand goes to the substance, establishing the genuineness of the thing, and not merely its quality.⁴ We must not forget, that, for mere breach of warranty, the law furnishes its own remedies, irrespective of mistake; and that there can be, in legal contemplation, no failure of consideration where the party gets the thing he really intended to buy, even though it turn out worthless in point of fact.⁵

A mistake as to the party with whom the bargain is made may be substantial under some circumstances, and under others quite immaterial. Where one sells out his business, and his successor deals with one of the old customers, who

¹ *Eichholz v. Banister*, 17 C. B. N. S. 708; *supra*, p. 381.

² See *Story Sales*, § 156; *supra*, p. 353.

³ See *Wheat v. Cross*, 31 Md. 99.

⁴ *Supra*, p. 362. And see 2 *Story Eq. Jur.* § 718; *Paton v. Rogers*, 1 Ves. & B. 351; *Lyon v. Bertram*, 20 How. 149. Cf. *Gardner v. Lane*, 9 Allen, 492.

⁵ See *Lamert v. Heath*, 15 M. & W. 487; *Sully v. Frean*, 10 Ex. 535; *Clarke v. Dickson*, E. B. & E. 148; *Wheat v. Cross*, 31 Md. 99; *Coolidge v. Brigham*, 1 Met. 547; *Benj. Sales*, bk. 3, c. 1; *Bryant v. Pember*, 45 Vt. 487.

makes a purchase in the store, meaning that it shall go on account to offset a credit of his own against the predecessor, and supposing, with good reason, that he is dealing with that predecessor, not having learned that he had sold out, this customer may, upon learning his mistake, avoid or refuse to perform the bargain; and this because it was an important element of the consideration that the purchase should go towards an adjustment of accounts, instead of rendering him liable for the full price. But where such purchaser had blinded himself against plain evidence that the party he dealt with was a stranger and successor, and not the predecessor, he cannot set up such mistake of parties in his own defence, for he is at fault; and so, too, if he goes on with the contract after once learning his error. In ordinary cases, there can be no good reason why one party should not be held to his contract if the other honestly acts up to his part, whether he be this or that person; though a seller whose price is unpaid is, of course, safer in dealing with a customer of good, than one of uncertain, standing; and a buyer, on the other hand, under a sale contract which still requires delivery, or may be reopened for breach of warranty or special stipulations, finds the personal *status* of the seller a matter of moment.¹ On the whole, the common sense of the intended contract is to be well weighed when parties are found in this plight; and the case must be quite exceptional where the mistake as to parties is mutual, and where the one was not at fault by being too careless, or the other by playing the impostor.

In fine, as Judge Blackburn observes in a late case, "Where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken,

¹ See *Boulton v. Jones*, 2 H. & N. 564; *Mudge v. Oliver*, 1 Allen, 74. And see *Benj. Sales*, bk. 3, c. 1, commenting upon *Boulton v. Jones*, *ib.*

so as to constitute a failure of consideration." And he adds, "As we apprehend, the principle in our law is the same as that of the civil law; and the difficulty in every case is, to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going as it were to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration."¹

A contract will be construed according to its reasonable intent; and hence, if the bargain be honest and clear, and honestly and clearly understood by one party, the other party will not be suffered to deprive him of the advantages thereof on any allegation of his own mistake. Thus, if there be a yacht, "The Dauntless," which the owner meant to sell, and, moreover, agreed to sell, the buyer cannot back out from the contract on the plea that he had a different yacht in his mind; and this because the seller's position is sound, while the buyer's is unsound, inasmuch as his excuse, even though ingenuous, admits carelessness; and of two innocent parties, the careless one must suffer. But, on the other hand, had there been two yachts named "The Dauntless," either of which might, consistently with the contract, have been the yacht stipulated for, the seller's intention to sell the one, and the buyer's to purchase the other, would render the mutual mistake sufficient for breaking up the contract.² Contrast with this an honest mistake caused by the seller's own carelessness. A case in point is that of a deaf man who came to offer a bid at auction, relying upon the advertised particulars of sale; and whom the court relieved from the bargain upon a bid made

¹ *Kennedy v. Panama Mail Co.*, L. R. 2 Q. B. 580. And see opinion in *Wheat v. Cross*, 31 Md. 99.

² See *Raffles v. Wichelhaus*, 2 H. & C. 906; *Alexander v. Worman*, 6 H. & N. 100; *Benj. Sales*, bk. 3, c. 1; *Kennedy v. Panama Mail Co.*, L. R. 2 Q. B. 580.

by him in entire ignorance of the fact that the auctioneer, by mere oral statement upon opening the sale, announced a substantial change from those advertised particulars; which circumstance, had he been aware of it, would have prevented him from bidding.¹ The fault in this case was that of the seller or auctioneer; and so the court obviously regarded it. There may be, then, not only a mutual or two-sided mistake, but a mistake on one side only; in which latter case we are to ask where the blame lay, and slip the burden along towards the side of him who was at fault, regarding the possible carelessness of the party pleading mistake, and the possible fraudulent or unfair conduct of the other party inducing the contract, and keeping sight of the interpretation which should rationally be put upon the contract itself as justifying or not the misconstruction in the case.²

Where a party purchased at an administrator's sale a "drill machine," in which, unknown to all parties at the time, were secreted by the decedent money and other valuables, it was held that the sale carried only the machine, and not the money and valuables besides.³ In such instances, the reasonable intent of the sale contract is decisive of the controversy.

It is the oft-repeated maxim of the courts, that ignorance of the law, as contrasted with mistake of facts, excuses no one; a phrase of dubious import, but which seems to exclude the plea of misunderstanding the ordinary law of one's country upon the matter at issue, yet leaving the door open for rectifying mistakes as to an individual's right of ownership.⁴ Ignorance and mistake are not synonymous words; and, even

¹ *Torrance v. Bolton*, L. R. 14 Eq. 124; L. R. 8 Ch. 118.

² See *Doggett v. Emerson*, 3 Story, 733.

³ *Huthmacher v. Harris*, 38 Penn. St. 491; Story Sales, § 151.

⁴ Story Eq. Jur. §§ 121-125; Benj. Sales, bk. 3, c. 1; *Wake v. Harrop*, 6 H. & N. 768; *Cooper v. Phibbs*, L. R. 2 H. L. 148-170, *per* Lord Westbury; Story Sales, § 157.

where one's mistake of law has wrought in great measure the failure of consideration, there might be found to concur a mistake of facts sufficient to justify a rescission of the contract.¹

One party may lead another into error by his own erroneous affirmation as to a material fact; and this is ground for setting the contract aside at the instance of the injured party, though the misstatement be innocently made.² The effect of an innocent misrepresentation on either side usually leaves the injured party to his remedy in damages as for warranty or other breach of contract; though the party unintentionally causing the injury is not liable in tort, not having committed a wrong.³

Now as to the effect of mistake upon a sale. It might be said, that in cases of mutual mistake, going to the substance of the contract, there is no contract at all; but where execution has followed in ignorance of the mistake, as where the buyer has paid a price, or the seller has handed a thing over, the practical question is one of rescission or avoidance, of putting parties back again to their former posture. If nothing has been done on either side under the contract, and the mistake is seasonably discovered, the simpler course is to refuse performance, and the contract will not be enforced.⁴ But if an innocent party has pursued the contract, and suffered some loss or injury in consequence, the law must do more. Thus, in the sale of the annuity (above referred to) upon the life of the party already deceased, the buyer had paid his money: the court, therefore, permitted him to re-

¹ *Ib.*

² See *Smith v. Richards*, 13 Pet. 26. But as to intentional misrepresentation or fraud, see *infra*. And see *Hanson v. Edgerly*, 29 N. H. 343; *King v. Eagle Mills*, 10 Allen, 551.

³ See *Benj. Sales*, bk. 3, pt. 2, c. 2, § 3; *Kennedy v. Panama Mail Co.*, L. R. 2 Q. B. 580.

⁴ See *Torrance v. Bolton*, L. R. 8 Ch. 118.

cover it again. And here could be nothing, unless perhaps some instrument in writing, to be given up to the seller.¹ But, in the bar of silver case, the seller had parted with a valuable thing; and hence the remedy applied was, not only that the buyer should recover his price, but that the seller should have back his bar of silver.² The rule is, as to two innocent parties who have performed acts under a mutual misunderstanding, that the court will allow either to turn back if he can take the other back with him; in other words, the one party may unravel the contract, if he can put the other *in statu quo*. Therefore the buyer of a chattel who would rescind the sale on this ground, and get back his price, must restore the chattel to the seller, unless he can show that it is of no intrinsic value, and its loss no injury to that party.³ Even where one has taken a forged or false note, or other security, and claims to be reimbursed for what the other innocent party received from him as its price, there are good reasons why he should be asked to give back the chattel, notwithstanding it may be worthless *per se*; for it is certainly an injury to the other party for him to retain it.⁴ But the situation being a delicate one, it has, for public and private reasons, been in some instances permitted the buyer to produce the note, and offer to return it at the time of trial. Nor is this practically a denial of the honest seller's right to be placed *in statu quo*.⁵ *Restituo in integrum* is, then, the condition upon which the law relieves one mistaken party, where the other was free of blame equally with himself; and, if this be impossible, the contract will not be rescinded upon any such ground as mere error.⁶

¹ Strickland v. Turner, 7 Ex. 208.

² Cox v. Prentice, 3 M. & S. 344.

³ Clark v. Dickson, E. B. & E. 148; Blackburn v. Smith, 2 Ex. 783; Dorr v. Fisher, 1 Cush. 271; Smith v. Smith, 30 Vt. 139; Lyon v. Bertram, 20 How. 149.

⁴ Coolidge v. Brigham, 1 Met. 547; Cook v. Gilman, 34 N. H. 556.

⁵ Hoopes v. Strasburger, 37 Md. 390.

⁶ See Benj. Sales, bk. 3, c. 1.

If the articles sold be under an entire contract, the buyer cannot insist upon the validity of the sale as to one portion, and set up the right to rescind for mistake as to another portion; but he must return the whole, or none at all. After so enjoying the consideration in part that entire restitution has become impossible, the party must seek some other remedy for his recompense.¹

Where goods are forwarded, through the seller's mistake, to a party who had not purchased them, the latter will probably be justified in sending them back through a trustworthy person, or otherwise acting in a reasonable manner: but he has no right to transfer the goods to another,—not even to the broker who was supposed to have negotiated the sale, for the manifest purpose of having such party keep the goods on his own account with the seller instead of returning them; and if by means of such transfer the seller is defrauded, as by the broker's absconding, the party first receiving them is responsible to the seller.² So, if A. purchase goods of B., and C., without B.'s knowledge or consent, delivers his own goods to A., as in fulfilment of the contract between A. and B., there is no relation of buyer and seller between A. and C.; but the duty of C., on ascertaining the mistake, is to return the goods, and not to sell them over or use them.³

II. Avoidance by reason of fraud. Fraud differs from mistake, as a ground of avoidance, in relying upon misconduct on the other side, rather than upon one's own innocent error, as the leading motive for setting the transaction aside. The error of the suffering party in a case of mistake borrows, strictly speaking, no assumption of wilfulness from the conduct of the opposite party: but, if the opponent's good faith

¹ *Giles v. Edwards*, 7 T. R. 181; *Harnor v. Groves*, 15 C. B. 667; *Devaux v. Connolly*, 8 C. B. 640; *Morse v. Brackett*, 98 Mass. 205; *Benj. Sales*, bk. 3, c. 1; *Story Sales*, § 152; *Lyon v. Bertram*, 20 How. 149.

² *Hiort v. Bott*, L. R. 9 Ex. 86.

³ *Randolph Iron Co. v. Elliott*, 34 N. J. Law, 184.

be seriously impugned, the suffering party must still have made his error, and innocently too, and such bad faith must have induced it, and caused him an injury ; and this latter case is one of fraud. Misrepresentation, wrongful concealment, the abuse of confidence, and employment of force, are among the leading causes which justify the interference of the courts for fraud : the one party must do wrong intentionally, and the other act because of such wrong ; and it is said that the modes of fraud are infinite, so that courts are indisposed to lay down any definition of the word.¹

Fraud is good cause for the non-enforcement or avoidance of a contract at the instance of the innocent party who is thereby injured ; and, following the general rules applicable to the subject, we find in a sale that the fraud to be remedied is (1st) that of the seller on the buyer, or (2d) that of the buyer on the seller, or (3d) that of both buyer and seller upon some third party.

(1st.) The fraud of the seller on the buyer. The general proposition most pertinent to this instance is, that a fraud cannot be imputed to one who fails to inform the mistaken person of that which he was under no obligation to impart to him. Why this should be well borne in mind appears from a reference to the rule of *caveat emptor*, which so far departs from the dictates of a rigid morality as very plainly to put upon a purchasing party the necessity of informing himself as to the qualities of whatever specific chattel constitutes the subject-matter of purchase, of drawing no inferences from outside appearances, from the price demanded for the thing, or the seller's failure to point out defects, but exercising his judgment so far as the opportunity permits ; and if he desires further assurance, to ask for a warranty.² Where the buyer

¹ See Story Eq. Jur. § 186 ; 2 Pars. Contr. 5th ed. 769 ; Benj. Sales, bk. 3, c. 2, § 1 ; Story Sales, § 158 *et seq.*

² Benj. Sales, bk. 3, pt. 2, c. 2, § 1 ; *Smith v. Hughes*, L. R. 6 Q. B.

inspects what he purchases, and the defect is apparent, he cannot allege fraud;¹ nor, of course, where the buyer takes the thing with all faults;² nor where it appears, that, instead of trusting to the seller's statements on the point, he verified by his own expert, or employed his own agents, and consummated the bargain upon their report;³ nor where he makes his own fair examination as to the point, and relies upon his judgment;⁴ nor, in general, where the matter was open to his observation, so that, by exercising ordinary diligence and prudence, he could have ascertained the defect.⁵ Mere statements of the seller, not amounting to warranty, ought not to be confided in.⁶ And, in general, the seller's silence, even though amounting to a passive acquiescence in the buyer's self-deception as to the quality or intrinsic value of the subject-matter bargained for, does not avoid the contract for fraud, but comes within the protection of *caveat emptor*.⁷

But where the seller is guilty of wilful misrepresentation as to material points, and thereby induces a party to purchase on terms that would otherwise have been withheld, and so, too, in case of wrongful concealment, the exercise of force, and fraudulent conduct generally, *caveat emptor* does not apply; and the sale is so far vitiated, that the deceived party may disaffirm it.⁸ The buyer's opportunity to be present, and examine the thing for himself before concluding the sale, has

597; *Jackson v. Wetherel*, 7 S. & R. 422; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331. This rule applies to incorporeal as well as corporeal personalty. *Renton v. Maryott*, 21 N. J. Eq. 123.

¹ *Morse v. Rathburn*, 49 Mis. 91.

² *Pearce v. Blackwell*, 12 Ire. 49.

³ *Howell v. Biddlecorn*, 62 Barb. 131.

⁴ *Pattison v. Jenkins*, 33 Ind. 87; *Stephens v. Orman*, 10 Fla. 9.

⁵ *Brown v. Leach*, 107 Mass. 364.

⁶ *Manning v. Albee*, 11 Allen, 522.

⁷ *Smith v. Hughes*, L. R. 6 Q. B. 579.

⁸ *Story Sales*, §§ 378-380; *Benj. Sales*, bk. 3, pt. 2, c. 2, § 1; *Regina v. Kenrick*, 5 Q. B. 49; *Paddock v. Stobridge*, 29 Vt. 470; *Manning v. Albee*, 11 Allen, 522. And see *supra*, pp. 328, 353.

an important bearing upon the issue as to whether he relied upon the seller's alleged false representation.¹ Another important circumstance is the character of the thing, as one whose qualities may be well known to the seller, but must be taken by any buyer on trust; as in the case of a patented article bought of an expert by one not skilled in machines.² Still another is the resort by the seller to some trick or artifice for the purpose of checking examination, or diverting the buyer from the line of inquiry which he would otherwise most likely have pursued.³ There are even circumstances under which a seller's concealment of facts known to him becomes fraudulent, notwithstanding he says nothing, — where silence carries with it the legal consequences of positive misrepresentation because it was his duty to speak out. One instance is that of selling fodder upon which poison has been spilled;⁴ another, that of putting out a prospectus or advertisement with artful concealments so as to give a false impression;⁵ another, that of wilfully hiding some internal defect which rendered the thing worthless.⁶ It is fraudulent for a seller to expose property for sale, knowing that there are incumbrances upon the title, and yet concealing such incumbrances;⁷ and usage of trade may sometimes require a party to conform by disclosing such defects as are usually made known to customers in that particular calling.⁸ Upon the whole, the courts appear to have vacillated considerably

¹ *Vandewalker v. Osmer*, 65 Barb. 556; *Smith v. Richards*, 13 Pet. 26; *Bondurant v. Crawford*, 22 Iowa, 40.

² *Page v. Dickerson*, 28 Wis. 694; *Kendall v. Wilson*, 41 Vt. 567.

³ *Story Sales*, § 381; *Smith v. Hughes*, L. R. 6 Q. B. 597; *Roseman v. Canovan*, 43 Cal. 110.

⁴ *French v. Vining*, 102 Mass. 135.

⁵ *Oakes v. Turquand*, L. R. 2 H. L. 325.

⁶ *Paddock v. Strobbridge*, 29 Vt. 420.

⁷ *Story Sales*, § 383; *Sweetman v. Prince*, 62 Barb. 256.

⁸ *Horsfall v. Thomas*, 1 H. & C. 90; *Jones v. Bowden*, 4 Taunt. 847; *Story Sales*, § 384.

in their decisions, so as to render many of the earlier opinions unsafe as statements of legal doctrine.¹

In order to avoid the sale on the ground of the seller's false representation, the party purchasing must have been deceived by the representation; and, in general, it must appear that the buyer trusted to the inducement which proves fraudulent, and bought on the strength of it.² Within a reasonable time, too, after discovering the fraud, the buyer must act upon his discovery; refusing to complete the purchase if the goods are not yet delivered; otherwise returning or offering to return them, demanding, if they are already paid for, a return of the price.³ But where the goods are of no value to seller or buyer, the buyer is relieved of the obligation to return.⁴ An acceptance of goods under a contract, when induced by the seller's fraud, leaves the buyer still at liberty to rescind upon discovering the fraud.⁵ Yet since the law puts the party to his option to reject for fraud, or stand to the contract, a defrauded buyer, who, after discovering the fraud, makes no objection, but deals with the article as his own or keeps it unreasonably long, loses the right of repudiating the sale; though, in affirmance of the contract, he may still recover damages.⁶ Nor is he only bound to rescind for fraud at the earliest practicable moment, but he must rescind the contract altogether, or not at all: he must retain neither the whole nor a part of the consideration received under an entire

¹ See *Bailey v. Walford*, 9 Q. B. 197, *per* Lord Denman, C. J.; *Benj. Sales*, bk. 3, c. 2, § 3.

² *Smith v. Hughes*, L. R. 6 Q. B. 597; *Benj. Sales*, bk. 3, pt. 2, c. 1, § 3; *Morse v. Rathburn*, 49 Mis. 91.

³ *Gatling v. Newell*, 9 Ind. 572; *Story Sales*, § 458; *Matteson v. Holt*, 45 Vt. 336; *Voorhees v. Earl*, 2 Hill (N. Y.), 292; *Benj. Sales*, bk. 3, c. 2, § 3; *Manahan v. Noyes*, 52 N. H. 232; *Garland v. Spencer*, 46 Me. 528.

⁴ *Ib.*

⁵ *Dutchess Co. v. Harding*, 49 N. Y. 321.

⁶ *Story Sales*, §§ 385, 458; *Clark v. Neufville*, 46 Ga. 261; *Clarke v. Dickson*, E. B. & E. 148; *Matteson v. Holt*, 45 Vt. 336.

contract.¹ For here, as in general cases of rescission, it is incumbent upon the party who would rescind, to place, or offer to place, the other party *in statu quo*, even though the buyer has innocently consumed the property, or changed its condition while ignorant of the fraud. His inability to place the seller in his former plight is held a sufficient barrier to rescission, and he is remitted to his suit in damages;² though it is held, that, if the goods were necessarily destroyed in discovering the fraud, such restitution will be dispensed with;³ and in some instances the duty of placing *in statu quo* is satisfied where the judgment in the suit will accomplish this result.⁴

It should be borne in mind that warranty and fraud are essentially different; that, while warranty is founded in a contract, a fraudulent statement is essentially a tort; and that a transaction cannot amount to warranty and tort at the same time. Representations in a sale, sufficient of themselves to constitute a warranty, will not be deprived of that character by the fact that they were falsely and fraudulently made.⁵ It follows that one who alleges fraud in complaint cannot at the trial elect to prove breach of warranty merely, nor recover damages as for assumpsit when the suit was grounded in tort.⁶ But the buyer may elect to sue in tort or contract, where either remedy would be justified by the facts; and, in the practice of some States, a count for false misrepresentation may be joined with a count for breach of warranty.⁷ The *scienter* or knowledge of the material fact, which in actions upon the

¹ *Campbell v. Fleming*, 1 Ad. & E. 40; *Miner v. Bradley*, 23 Pick. 457; *Willoughby v. Moulton*, 47 N. H. 205; *Voorhees v. Earl*, 2 Hill, 292; *Junkins v. Simpson*, 14 Me. 364.

² *Gatling v. Newell*, and other cases *supra*; *Western Bank v. Addie*, L. R. 1 H. L. Sc. 145; *Clarke v. Dickson*, E. B. & E. 148.

³ *Smith v. Love*, 64 N. C. 439.

⁴ *Allerton v. Allerton*, 50 N. Y. 670.

⁵ *Carter v. Abbott*, 33 Iowa, 180; *Rose v. Hurley*, 39 Ind. 77.

⁶ *Ross v. Mather*, 51 N. Y. 108, disapproving *Williamson v. Allison*, 2 East, 446.

⁷ *Lassiter v. Ward*, 11 Ire. 443.

warranty need not appear, must, in actions based on fraud, be distinctly shown ;¹ and, for fraudulent representation, the measure of damages is, in general, the difference between the actual and represented value.² What has been said as to the buyer's remedies, under a breach of contract, is largely applicable to suits brought in the present connection : and the buyer has been permitted to bring his cross-action for fraud in affirmance of the sale, and recoup damages when the seller sues for his price ;³ also to recover, in a suitable case, consequential damages on the principle laid down for breach of contract.⁴

The damages usually recoverable for breach of warranty may be greatly enhanced in case fraud is set up and proved. A manufacturer who sells to one for his own use an article in which there is a defect, which he points out, is not liable for injuries resulting therefrom, unless the article is in its nature dangerous ;⁵ and with reference to articles only dangerous *sub modo*, and parties but remotely connected with the dealer, negligence or wrongful dealing on the seller's part should not be hastily affirmed, with its disastrous consequences.⁶ Otherwise it is a general rule, that a seller may make himself liable in an action founded on tort for deceit or negligence, to any one, be it buyer or third party, who, not being at fault himself, is injured by a dangerous or noxious article which is sold without notice of its dangerous properties ; and this rule, which covers all injuries which may reasonably be contemplated as likely to result from such sale, has been applied

¹ Clark v. Bamer, 2 Lans. 67 ; Bartholemew v. Bushnell, 20 Conn. 271 ; Kingsbury v. Taylor, 29 Me. 508 ; Pike v. Fay, 101 Mass. 134.

² Durst v. Burton, 2 Lans. 137 ; Stiles v. White, 11 Met. 356.

³ Perley v. Balch, 23 Pick. 283 ; Weimer v. Clement, 37 Penn. St. 147 ; Starr Glass Co. v. Morey, 108 Mass. 573 ; Garland v. Spencer, 46 Me. 528.

⁴ Story Sales, § 458 ; Hadley v. Baxendale, 9 Ex. 341 ; *supra*, p. 600.

⁵ Loop v. Litchfield, 42 N. Y. 351.

⁶ *Ib.* ; Davidson v. Nichols, 11 Allen, 514.

in numerous instances to the relief of those injured by the sale of guns, poisons, compounds of dangerous ingredients, and the like, where the seller has, by direct falsehood or culpable suppression of facts which should have been made known, endangered the buyer or others in life, limb, or property.¹

Where the buyer is defrauded by the seller's agent, he may rescind the contract if he can put the principal party *in statu quo*; but his right to sue the principal for deceit or other tort must depend, according to the latest English cases, upon the latter's intent to participate in the injury. Against the guilty agent personally such action may be brought, but not against an innocent principal. Thus, in a sale made through the fraud of corporation-officers, it has been held that the defrauded buyer may refuse to perform, or may have his contract rescinded, the fraud of the agents being so far treated as the fraud of the principal; but that the corporation, if innocent, cannot be sued in damages for the deceit.² Now, as heavy damages may be awarded for breach of a contract, by way of consequential injuries, this distinction does not appear easy of practical enforcement. The principal, who has not authorized or participated in the wrong, may doubtless put himself right by rescinding when he discovers the fraud of his agent, and making prompt restitution; nor, by adopting the contract, would he ordinarily mean to adopt such fraudulent words or acts of the agent as he was unaware of:³ but the evil is

¹ See *Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. 339; *George v. Skivington*, L. R. 5 Ex. 1; *Benj. Sales*, bk. 3, pt. 2, c. 2, § 1; *Thomas v. Winchester*, 2 Seld. 397; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *French v. Vining*, 102 Mass. 132; *Marsh v. Webber*, 16 Minn. 418.

² *Western Bank v. Addie*, L. R. 1 H. L. Sc. 146; *Benj. Sales*, bk. 3, c. 2, § 3; *Udell v. Atherton*, 7 H. & N. 172. But see *Barwick v. English, &c. Bank*, L. R. 2 Ex. 259; *Oakes v. Turquand*, L. R. 2 H. L. 325.

³ See *Elwell v. Chamberlin*, 31 N. Y. 611; *Bennett v. Judson*, 21 N. Y. 238.

in permitting the principal to enjoy the benefit of the contract fraudulently made, and yet claim immunity for the fraud. The better rule would appear to be, that a principal, who retains the benefits of the contract after learning of the agent's fraud, exposes himself to legal liability for all the legal consequences flowing from the fraud, so far as that fraud was an element in procuring the sale, though not, perhaps, technically liable as for deceit; in other words, that the seller cannot, under such circumstances, claim to be an "innocent principal."¹ Nor, in this country, does any special distinction appear to have been taken in such cases, as against suits founded in the agent's tort; the right of the injured party to rescind or claim damages for the fraud being affirmed in general terms.² We may add, that two joint owners of a chattel are held jointly liable for the fraudulent representations of one of them in negotiating a sale of the chattel on their joint behalf.³

(2d.) The fraud of the buyer on the seller. This most commonly consists in such falsehood as to one's solvency as induces the seller to part with his goods without getting paid for them. The rules set forth under this head do not altogether harmonize: but we take the better opinion to be, that the seller who never designed parting with his chattels, except to a party able to pay for them, shall be shielded against the buyer's fraud, notwithstanding the latter's misconduct consisted in suppression of the truth instead of open false-

¹ *Durst v. Burton*, 47 N. Y. 167; *New York, &c. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Concord Bank v. Gregg*, 14 N. H. 331; *Crump v. U. S. Mining Co.*, 7 Gratt. 352; *Fogg v. Griffin*, 2 Allen, 1; *Story Agency*, § 308; *Mundorff v. Wickersham*, 63 Penn. St. 87; *Sch. Dom. Rel.* 636; *McClellan v. Scott*, 24 Wis. 81; *Fitzsimmons v. Joslin*, 21 Vt. 129; 2 Kent Com. 616, 621. It is too late to disaffirm the agent's contract after the principal has gone into bankruptcy. *Oakes v. Turquand*, L. R. 2 H. L. 325.

² *Ib.*

³ *White v. Sawyer*, 16 Gray, 586.

hood; and that, while it is not necessarily fraudulent for one who buys goods on credit to omit disclosing insolvency, yet if he purchased knowing his own insolvency, and with a preconceived design not to pay for the goods, the seller, who was misled into trusting the party accordingly, may impeach the transaction as fraudulent.¹ Such design may be inferred by the jury from the conduct of the buyer and surrounding circumstances, with reference not only to the sale in question, but to contemporaneous transactions.² That the buyer's actual fraudulent misrepresentation and false pretences as to his good standing, which he made to induce the purchase, may be relied on, to the still greater advantage of the defrauded seller, for the purpose of impeaching such sale to an insolvent party, admits of no question.³

The main issue, not always kept clearly in view where third parties who have become *bona fide* purchasers from the fraudulent buyer in possession are concerned, is, whether the sale had gone so far as to divest the seller, agreeably to his intention, of full title, including the right of property as well as of possession, or nothing more than possession; for, if he had merely meant to surrender possession while retaining his rights and remedies for securing the price as owner, the goods, as we have elsewhere seen, may still be reclaimed as the seller's

¹ *Ferguson v. Carrington*, 9 B. & C. 59; *Benj. Sales*, bk. 3, c. 2, § 2; *Hennequin v. Naylor*, 24 N. Y. 139; *Kline v. Baker*, 99 Mass. 253; *Thompson v. Rose*, 16 Conn. 71; *Stewart v. Emerson*, 52 N. H. 317; *Fox v. Webster*, 46 Mis. 181. "In such a case," says Hoar, J., in *Dow v. Sanborn*, 3 Allen, 181, "the fraudulent party pretends to be a purchaser when he is not, but is in fact attempting to obtain possession of the property of another dishonestly with a view to deprive him of it without consideration. . . . In its moral quality it is hard to distinguish it from a larceny." But see *Backentoss v. Speicher*, 31 Penn. St. 324; *Nichols v. Pinner*, 18 N. Y. 295; *Garbutt v. Bank*, 22 Wis. 384; *Story Sales*, § 176. In *Redington v. Roberts*, 25 Vt. 686, a very fine distinction is asserted.

² *Hennequin v. Naylor*, 24 N. Y. 139.

³ See *Jordan v. Parker*, 56 Me. 557; *Hoffman v. Noble*, 6 Met. 68.

against the world.¹ What has been said of the doctrine of stolen goods has also a bearing upon the present inquiry.² Subject to these qualifications, *bona fide* third persons, who have purchased for value from the original buyer the whole or a portion of the goods which he fraudulently procured, while such goods were in his possession, are protected in rights acquired by them before the defrauded seller has done some act to disaffirm the original transaction.³ But one who claims to be such *bona fide* purchaser for value from the fraudulent buyer, must, as against the defrauded seller, show that he is so;⁴ and the defrauding buyer's attaching or execution creditors occupy no such vantage-ground, but are only substitutes for the buyer as respects the title he acquired.⁵

The buyer's fraud may consist in giving a false name; and if the seller contract on the faith of a mistaken identity so induced, and trusting to the credit of the party falsely designated, he shall not be held, upon discovering the fraud, to carry out the bargain with the impostor.⁶ But if the bargain were with such buyer personally, without reference to any name he might assume, the seller could hardly set up the fraud, even if he wished to; especially after such party has

¹ See Benj. Sales, bk. 3, pt. 2, c. 2, § 2; *Dean v. Yates*, 22 Ohio St. 388; *supra*, p. 297.

² *Supra*, p. 21.

³ *Pease v. Gloahec*, L. R. 1 P. C. 220; *Kingsford v. Merry*, 11 Ex. 577; *Williamson v. Russell*, 39 Conn. 406; *Rowley v. Bigelow*, 12 Pick. 307; *Ditson v. Randall*, 33 Me. 202; *Barnard v. Campbell*, 65 Barb. 286; *Larkins v. Eckwurz*, 42 Ala. 322; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Hall v. Hinks*, 21 Md. 406. In *Shufeldt v. Pease*, 16 Wis. 659, this rule is applied in favor of a creditor who takes the goods to satisfy his pre-existing debt.

⁴ *Devoe v. Brandt*, 53 N. Y. 462; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Lynch v. Beecher*, 38 Conn. 490; *Porter v. Parks*, 49 N. Y. 564.

⁵ *Jordan v. Parker*, 56 Me. 557; *Thompson v. Rose*, 16 Conn. 71; *Hartt v. McNeil*, 47 Mis. 526; *Wiggin v. Day*, 9 Gray, 97; *Field v. Stearns*, 42 Vt. 106; *Devoe v. Brandt*, 53 N. Y. 462.

⁶ *Duff v. Budd*, 3 B. & B. 177; *Stephenson v. Hart*, 4 Bing. 476.

paid or tendered the price, and otherwise evinced his readiness and ability to fulfil the terms of the bargain on his part.¹ Again: the buyer may have misrepresented himself as an agent or partner of some house of good standing, and so induced the sale: in which case, as between himself and the defrauded seller, the sale may be rescinded, and the goods recovered; the question being, whether the sale was made to the man on his own responsibility, or simply as agent or partner of the concern represented.²

Caveat emptor has its reciprocal advantage for the buyer; and, dealing with the seller as one who exercises his own wits in making a bargain, he is not bound to impart the information upon which he bases his offer, nor disclose how or with whom he expects to derive a profit. Unless some special trust is reposed in him by the seller, the buyer can hardly be made answerable for merely concealing his knowledge of facts; and the wide dissemination of news by telegraph and the press excludes from our present consideration much of the old learning as to the buyer's justification in withholding his personal information of some sudden rise in foreign markets, of the declaration of war, and the like. But, where the common channels of news afford no help, the concealment of information not accessible to a seller might, in some extreme case, be a dereliction of duty on the buyer's part; and, in any case where the buyer procures an article at an unreasonably low price, his actual misrepresentations and deceitful conduct, inducing that result, are likely to vitiate the transaction, at the instance of the injured party.³ The legal duty of imparting one's secret information affecting the value of the

¹ *Duff v. Budd*, *supra*; *Benj. Sales*, bk. 3, c. 2, § 1; *Clough v. London, &c. R. R. Co.*, L. R. 7 Ex. 26.

² *Barker v. Dinsmore*, 72 Penn. St. 427; *Higsons v. Burton*, 26 L. J. Ex. 312; *Hardman v. Booth*, 1 H. & C. 803.

³ See *Story Sales*, § 175; 2 *Kent Com.* 482, *n.*; *Benj. Sales*, bk. 3, c. 2, § 2.

thing is by no means commensurate with the moral obligation;¹ but the court and jury are keenly susceptible to the practice of open imposition.²

The buyer's fraud may be with reference to a third person. Where the seller is induced by fraudulent representations to sell goods to an insolvent third person, from whom the misrepresenting party afterwards obtains them, the seller may sue directly the latter party, whose fraudulent conduct induced the sale, as though he had bought the goods in his own name; this on the assumption either of a fraudulent conspiracy, rendering each participant liable, or that the nominal purchaser was only a secret agent for the misrepresenting party who finally bought the goods.³ But fraudulent conduct is still a question of motive; and a merely false statement as to some party's solvency falls within the protection of a section in Lord Tenterden's Act (re-enacted in some of the United States) which requires one's representations concerning the character or credit of another party to be in writing, and signed by himself, in order to charge him personally;⁴ and it is held, that even though the creditor of a firm in failing circumstances, who causes a party to sell such firm, on his own misrepresentations, goods upon credit, which he afterwards obtains in payment of his pre-existing debt, becomes directly liable for his fraud, he cannot be treated as incapacitated from purchasing the goods.⁵

¹ *Laidlaw v. Organ*, 2 Wheat. 178; *Turner v. Harvey, Jacob*, 169; *Vernon v. Keys*, 12 East, 632; *Jones v. Franklin*, 2 M. & R. 348.

² Cf. *Turner v. Harvey, Jacob*, 169, as to the purchase of land secretly known to contain a valuable mine; *Brown v. Montgomery*, 20 N. Y. 287; *Prescott v. Wright*, 4 Gray, 461.

³ *Biddle v. Levy*, 1 Stark. 20; *Hill v. Perrott*, 3 Taunt. 274; *Benj. Sales*, bk. 3, c. 2, § 2; *Phelan v. Crosby*, 2 Gill, 462; *State v. Schulein*, 45 Mis. 521.

⁴ Act of Geo. IV., c. 14, § 6; 2 Kent Com. 489, 490, *n.*; *Haslock v. Ferguson*, 7 A. & E. 86.

⁵ *State v. Schulein*, 45 Mis. 521.

Inasmuch as the defrauded seller's position is the correlative of a defrauded buyer's, such a party is likewise bound to elect what course he shall pursue after discovering the fraud. He may disaffirm the contract by reason of the fraud; refusing to deliver if he has not already done so, and retaining his legal hold upon the goods if the lien be not extinguished, or else demanding them from the buyer if the latter have acquired possession and full title. But he may doubtless, on the other hand, affirm the sale, notwithstanding the fraud; and if, after discovering the fraud, he voluntarily sues on the contract to recover the price,¹ or accepts security for the purchase-money from the defrauding buyer,² this is, as a matter of law, such affirmance of the sale as debars him from setting up the fraud afterwards. Levying an attachment upon the goods fraudulently purchased, and selling them thereunder, with other goods of the buyer, is, however, held to be no affirmance of the fraud.³ For the contract is voidable, and not void; and upon this lack of avoidance do parties stand who have *bona fide* acquired adverse claims before the seller's repudiation.⁴ On the other hand, where the seller has rightfully rescinded the contract by reason of the buyer's fraud, no act on his part alone, without the other's co-operation, will revive the contract, or enable him to sue upon it.⁵ In exercising his right to rescind, it is enough, where the buyer has given his worthless note for the price, that the seller, in his suit brought to disaffirm the sale, leaves the court to return the note and so place the buyer *in statu quo*.⁶

¹ Parke, B., in *Stevenson v. Newnham*, 13 C. B. 285; *Story Sales*, §§ 446, 447; *Dibblee v. Sheldon*, 10 Blatchf. 178; *Byard v. Holmes*, 4 Vroom, 119.

² *Joslin v. Cowee*, 52 N. Y. 90.

³ *Dean v. Yates*, 22 Ohio St. 388.

⁴ *Pease v. Gloahec*, and other cases *supra*, p. 638. See *Clough v. London, &c. R. R. Co.*, L. R. 7 Ex. 26, for a full statement of the defrauded seller's position and the limitations of his right.

⁵ *Kinney v. Kiernan*, 49 N. Y. 164.

⁶ *Nichols v. Michael*, 23 N. Y. 264; *Coolidge v. Brigham*, 1 Met. 547.

The privilege of avoiding a bill of sale extorted by force from an unwilling seller is held to be so far personal with the seller himself, that his attaching creditors will not be allowed to impeach it.¹

Fraud may arise in a case of exchange. Where S. exchanged horses with D., knowing that D. had stolen the horse, and B., with the same knowledge, bought S.'s horse from D., and the owner of the stolen horse took it from S., it was held that S. could not recover from B., being *in pari delicto*.² But, where one is sued in tort for false and fraudulent representations concerning a horse which he exchanged with the plaintiff for the plaintiff's horse, he may recoup damages for like misrepresentations made to him in the transaction by the plaintiff concerning his own horse.³

(3d.) The fraud of both buyer and seller upon some third party. Discussion of this subject has been somewhat anticipated; and we simply add, that the rule is a variable one as to the effect of a bill of sale upon creditor's rights without an accompanying change of possession between seller and buyer. The whole subject is regulated largely by local statutes, among which the statutes of Elizabeth concerning fraudulent conveyances are prominent; and the general principle favored in England and America is, that possession affords only *prima facie* evidence of fraud, which may be sustained or rebutted by proof of other circumstances; though the stricter doctrine has prevailed in our Federal courts and certain States, that an absolute bill of sale, unaccompanied by a corresponding change of possession, is of itself a fraud in law.⁴

¹ Lewis v. Bannister, 16 Gray, 500.

² Bixter v. Saylor, 68 Penn. St. 146.

³ Carey v. Guillow, 105 Mass. 18.

⁴ See Benj. Sales, bk. 3, c. 2, § 4; Stats. 13 Eliz. c. 5, and 27 Eliz. c. 4; 17 and 18 Vict. c. 36; Edwards v. Harben, 2 T. R. 587; Story Sales, §§ 510-529; 2 Kent Com. 520-532. And see *supra*, pp. 102, 265, 296, 414.

CHAPTER XVII.

ILLEGAL SALES ; MUTUAL RESCISSION.

III. AVOIDANCE by reason of illegality is the next topic for treatment. Illegality cuts deeper than fraud: for a contract of sale which the law makes illegal cannot be enforced on either side, but is utterly void; and, when such contract is found to be so by any innocent party who was misled into the bargain, he has no option but to drop it, as he can neither defend nor sue upon the bargain, and may render himself criminally responsible to the State if he goes farther. But as there are illegal sales at the common law, and illegal sales founded in statute, the effect of illegality in the latter sense merely is liable to special regulation.

The old distinction taken between *mala in se* and *mala prohibita* is not countenanced by the late authorities; and, notwithstanding the moral feeling and common sense of men do discriminate,¹ the general rule is, that any promise or undertaking whose performance is founded in illegality, or tends to carry out some unlawful purpose, is of itself void, and will not sustain an action; and the law which prohibits the end will not lend its aid in promoting the means whereby it was designed to be carried into effect.² But it is sometimes held that the mere knowledge by the one party of the other's

¹ See *Hill v. Spear*, 50 N. H. 253, *per curiam*.

² *White v. Buss*, 3 Cush. 448, *per Shaw, C. J.* And see *Benj. Sales*, bk. 3, c. 3, § 1; *Story Sales*, §§ 485-488; *Montefiori v. Montefiori*, 1 Wm. Bl. 363; *Canaan v. Bryce*, 3 B. & Ald. 179; *Concord v. Delaney*, 58 Me. 309; *Watrous v. Blair*, 32 Iowa, 58; *Cameron v. Peck*, 37 Conn. 555; *Myers v. Meinrath*, 101 Mass. 366; *Brackett v. Edgerton*, 14 Minn. 174; *Hanauer v. Doane*, 12 Wall. 342.

guilty purpose, where his own act may be consistently innocent, is insufficient to deprive him of his legal remedies, unless it further appear that he meant to enable the buyer to do the illegal act.¹ If such seller had no knowledge whatever of the buyer's guilty purpose, or even reasonable cause to believe, and no more, he could recover.² Hence, to a certain extent, a transaction may be illegal on one side, and not on the other, because of the motives of the respective parties to the sale, — the one being innocent, and the other guilty. So, too, the guilty party and the guilty purpose must often be separated; for while it is unlawful for one to let premises for purposes of prostitution, or sell tools for the purpose of house-breaking, it is not unlawful to furnish a person with necessities of any kind because she happens to be a prostitute, or to make an innocent contract with a professional house-breaker.³ And where, in an extreme case, the parties to an illegal contract are not *in pari delicto*, the party who has been oppressed, or of whose situation the other takes undue advantage, has been recognized as not without a remedy for recovering what was extorted from him.⁴ Once more: the disaffirmance of the contract in its initial stage, and before the transaction is completely executed, might leave a party in a favorable situation for resorting to the courts.⁵ But these

¹ *Curtis v. Leavitt*, 15 N. Y. 9; *Bishop v. Honey*, 34 Tex. 245; *Armstrong v. Toler*, 11 Wheat. 258; *Hodgson v. Temple*, 5 Taunt. 181; *Tuttle v. Holland*, 43 Vt. 542; *Tracy v. Talmage*, 4 Kern. 162; *Story Sales*, § 506; *McGavock v. Puryear*, 6 Cold. 34. But see *Hanauer v. Doane*, 12 Wall. 342, *infra*, p. 647 n.

² See *Kottwitz v. Alexander*, 34 Tex. 689; *Prescott v. Norris*, 32 N. H. 101; *Buck v. Albee*, 26 Vt. 184; *Hotchkiss v. Finan*, 105 Mass. 86.

³ *Story Sales*, § 488; *Bowry v. Bennet*, 1 Camp. 348. But see *Pearce v. Brooks*, L. R. 1 Ex. 212.

⁴ *Jaques v. Golightly*, 2 Wm. Bl. 1073; *Worcester v. Eaton*, 11 Mass. 368; *Concord v. Delaney*, 58 Me. 309; *Butler v. Northumberland*, 50 N. H. 33; *White v. Franklin Bank*, 22 Pick. 281; *Tracy v. Talmage*, 4 Kern. 162.

⁵ *Tracy v. Talmage*, *supra*. Comity or the conflict of laws is some-

qualifications of the rule are chiefly applied by way of indulgence to cases where the transaction involves no moral turpitude on the part of the party seeking a remedy, but is a violation of some statute against which public policy pronounces with some hesitation. But participating in a guilty purpose, and being *in pari delicto*, must put the party altogether outside of the law as to the guilty transaction; for "no man," as Lord Mansfield says, "shall set up his own iniquity as a defence any more than as a cause of action;"¹ and with regard to the illegal contract, the law will leave the parties where it finds them.² Whenever an illegal contract has been carried out fully, all acts of delivery completed, and the price paid, neither law nor equity will reopen the transaction.³

Where the whole consideration of a demand founded upon transactions is tainted by no illegality, and some of the promises only are illegal, the illegality of these does not communicate itself to or taint the others, unless the contract be an entire one, with its parts inseparable;⁴ and hence it is held that a number of articles may be sold to a customer under different sales, and the account rendered be in general sustained, notwithstanding some of the items prove to be for spirituous liquors, whose sale is forbidden by statute.⁵ Even though a promissory note be given in settlement of the whole

times set up as a cause of indulgence in this connection. See *Hill v. Spear*, 50 N. H. 253; 1 Sch. Pers. Prop. 347 *et seq.*; *Castrique v. Imrie*, L. R. 4 H. L. 414.

¹ *Montefiori v. Montefiori*, 1 Wm. Bl. 363.

² *White v. Buss*, and other authorities, *supra*, p. 643.

³ *Story Sales*, § 488.

⁴ *Carleton v. Woods*, 28 N. H. 290; *Boyd v. Eaton*, 44 Me. 51; *McKnight v. Devlin*, 52 N. Y. 399; *Thurston v. Percival*, 1 Pick. 415; *Gelpcke v. Dubuque*, 1 Wall. 221; *Hanauer v. Gray*, 25 Ark. 350; *Erie R. R. Co. v. Union Express Co.*, 35 N. J. Law, 240; *Story Sales*, § 504; *Crookshank v. Rose*, 5 C. & P. 19; *Hinde v. Gray*, 1 M. & G. 195; *Lange v. Werk*, 2 Ohio St. 519.

⁵ *Carleton v. Woods*, *supra*.

account, the character of the contract is not concluded, unless the taking of the note was such satisfaction as would prevent a suit upon the demand.¹ But "if any part of an indivisible promise," says Gibson, C. J., "or any part of an indivisible consideration for a promise, is illegal, the whole is void;"² and hence, if one agrees to pay a certain sum in consideration of the transfer of a stock of goods, and a guarantee to procure for the buyer a certain public office, the illegality of the latter portion taints the whole consideration.³ Nor can the parties, by artifice or evasion in making up their account, separate the legal and illegal items in an entire contract of sale, so as to render the contract enforceable as to the former portion.⁴

Furthermore, it should be said, that notwithstanding this later repudiation, out of respect to the legislative power, of the old distinction between *mala in se* and *mala prohibita*, our courts still incline to press illegal contracts involving a palpable offence against public morals more closely than those of a more venial nature whose criminality consists in violating some statute of doubtful policy. The qualifications of the rule above stated should be taken accordingly. Particularly does this hold true of the qualification in favor of requiring something more than guilty knowledge on a seller's part, which the best of the late English and American cases utterly repudiate, save as applied to contemplated acts of inferior criminality and completed criminal acts which the party in question sanctions, not assists, by his conduct; or, in other words, only uphold as to sales, where the seller may possess knowledge of the buyer's illegal purpose, and yet sell without

¹ *Pecker v. Kennison*, 46 N. H. 488.

² *Benj. Sales*, bk. 3, c. 3, § 1; *Waite v. Jones*, 1 Bing. N. C. 656; *Filson v. Himes*, 5 Barr, 452. And see *Kottwitz v. Alexander*, 34 Tex. 689; *Chandler v. Johnson*, 39 Geo. 85; *Hanauer v. Doane*, 12 Wall. 342; *More v. Bonnet*, 40 Cal. 251.

³ *Filson v. Himes*, *supra*.

⁴ *Ladd v. Dillingham*, 34 Me. 316.

aiding to accomplish some heinous public offence. Upon this distinction are founded decisions which render the seller's guilty knowledge fatal to his rights, where he sells poison knowing that the buyer means to drug another with it,¹ or supplies goods for sustaining rebels in arms,² or vends a carriage to a prostitute to be used in aid of her vocation.³ It follows that the bargain for a thing, in itself proper, may become void from regard to the purpose for which it is to be applied, and one's guilty knowledge of that purpose.⁴

He who sells by another sells by himself, on the principle of agency; and a principal cannot reap the benefits of an illegal transaction which a third party whom he employed carried out, and wherein he participates by knowingly sanctioning the sale.⁵ In whatever capacity one intentionally furthers the violation of law, his rights in the illegal transaction are excluded.⁶

Of sales which may be pronounced illegal at the common law, irrespective of legislation (which, however, may recog-

¹ *Langton v. Hughes*, 1 M. & S. 593. And see *McFarlane v. Taylor*, L. R. 1 H. L. Sc. 245.

² *Martin v. McMillan*, 65 N. C. 199; *Hanauer v. Doane*, 12 Wall. 342. And see *Bradley, J.*, in the last-named case: "Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them, and intends to use them, for that purpose, and then pretend that he is not a participator in the guilt? Can he wrap himself up in his own selfishness and heartless indifference and say, 'What business is that of mine? Am I the keeper of another man's conscience?' No one can hesitate to say that such a man voluntarily aids in the perpetration of the offence, and, morally speaking, is almost, if not quite, as guilty as the principal offender." *Hanauer v. Doane*, *supra*, pp. 342, 347. The doctrine, with its limits, is ably set forth in this opinion of the Supreme Court of the United States.

³ *Pearce v. Brooks*, L. R. 1 Ex. 212.

⁴ See *Adams v. Coulliard*, 102 Mass. 167; *Benj. Sales*, bk. 3, c. 3, § 1; *Story Sales*, § 506 and *n.*

⁵ *Nicholson v. Gooch*, 5 E. & B. 999; *Galligan v. Fannan*, 7 Allen, 255.

⁶ See *Story Sales*, §§ 505, 506.

nize the offence besides), a number of classes may be stated. Whatever contravenes public decency and good morals, as sales for purposes of prostitution, and sales of obscene books or pictures, must be pronounced clearly illegal and void.¹ So the sale of poison, or murderous or burglarious implements, is illegal when in aid of felonious designs against life or property.² Sales to a public enemy are void by the common law;³ and the same may be said of sales in aid of treason:⁴ under which rule may likewise be brought smuggling contracts of sale;⁵ though all these offences are largely regulated by statute; and, as to the last-named especially, the English law has ever been more solicitous of offences against its own enactments than those of other countries. Many classes of contracts are against public policy, and therefore illegal, which it is beyond our present scope to consider; and this same public policy is a variable thing of itself: but, as a writer observes, whatever contravenes an actual rule of policy, or which interferes seriously with the true interests of society, is against public policy.⁶ When narrow views of trade were entertained, the common law pronounced "forestalling, regrating, and engrossing" contrary to public policy, and illegal, abhorring all attempts on the part of speculators to control the market; but such is the rule no longer.⁷ Nor are "gold" sales, in a period of paper-money as legal tender,

¹ *Benj. Sales*, bk. 3, c. 3, § 1; *Poplett v. Stockdale*, Ry. & M. 337; *Pearce v. Brooks*, L. R. 1 Ex. 212.

² *Langton v. Hughes*, 1 M. & S. 593; *Roberts v. Egerton*, L. R. 9 Q. B. 494.

³ *Benj. Sales*, bk. 3, c. 3, § 1; *Brandon v. Nesbitt*, 6 T. R. 23.

⁴ *Hanauer v. Doane*, 12 Wall. 342; *Hanauer v. Woodruff*, 15 Wall. 439.

⁵ *Benj. Sales*, bk. 3, c. 3, § 1; *Pellecat v. Angell*, 2 C. M. & R. 311; *Creekmore v. Chitwood*, 7 Bush, 317; *Story Sales*, §§ 507-509.

⁶ *Story Sales*, §§ 489, 491; *Richardson v. Mellish*, 2 Bing. 242; *Crawford v. Russell*, 62 Barb. 92.

⁷ 4 Bl. Com. 158; *Benj. Sales*, bk. 3, c. 3, § 1; *Story Sales*, § 490; 7 and 8 Vict., c. 24.

or stock-sales, though sometimes akin to gambling, to be pronounced classes of transactions void as against public policy.¹

On general grounds of public policy, but with a special view to the pure administration of civil government, the sale of a public office, or the transfer of property in consideration of procuring a public office, is void ; and, by whatsoever device such a consideration is embodied in a sale contract, the bargain must fail as illegal.² And whether it be the sale of an office outright, or the parcelling out of its profits between the office-holder and another, the rule is the same.³ So is a sale illegal whose moving consideration is the influencing of a public officer, or one dealing with such officer, in the discharge of his duty.⁴ Lobby contracts, so called, inasmuch as they tend to corrupt legislation, are likewise illegal, whether for fixed or contingent fees ; and so with other contracts founded upon the consideration of personally influencing public officers to perform certain official acts ; though services might be rendered of no sinister nature, as in procuring testimony, conducting a hearing, or making an argument, in furtherance of legislative or executive as well as judicial procedure, sufficient to base a legitimate claim upon for compensation.⁵ All sales in consideration of carrying or influencing public elections are void.⁶

With more especial reference to the purity of judicial

¹ *Brown v. Speyers*, 20 Gratt. 296 ; *Appleman v. Fisher*, 34 Md. 540.

² *Story Sales*, § 494 ; *Wells v. Foster*, 8 M. & W. 149 ; *Filson v. Himes*, 5 Barr, 452 ; *Benj. Sales*, bk. 3, c. 3, § 1.

³ *Hunter v. Nolf*, 71 Penn. St. 282 ; *Gray v. Hook*, 4 Comst. 449 ; *Benj. Sales*, bk. 3, c. 3, § 2.

⁴ *Cook v. Shipman*, 51 Ill. 316 ; *Richardson v. Crandall*, 48 N. Y. 318 ; *Weld v. Lancaster*, 56 Me. 453.

⁵ *Mills v. Mills*, 40 N. Y. 543 ; *Bowman v. Coffroth*, 59 Penn. St. 19 ; *Trist v. Child*, 21 Wall. 441. See *Winpenny v. French*, 18 Ohio St. 469 ; *Sedgwick v. Stanton*, 4 Kern. 289 ; *Swayne, J.*, in *Trist v. Child*, *supra*.

⁶ *Martin v. Wade*, 37 Cal. 168 ; *Swayze v. Hull*, 3 Halst. 54 ; *Duke v. Asbee*, 11 Ire. 112.

administration, and the sanctity of private rights, have the courts generally repudiated as illegal the sale of lawsuits, mentioning under this head the kindred offences of champerty and maintenance; but the ancient common-law rules against one party's intermeddling with another's right to litigate are greatly relaxed under the influence of equity and the modern practice acts.¹

No contract of sale is good which is in general restraint of trade; for this is in derogation of private rights, and tends to monopoly. But a contract imposing upon consideration a partial restraint is binding, if the restraint be kept within reasonable bounds. The vending of patent-rights or copyrights does not contravene this rule, for this amounts to the limited propagation of one's secret; and such rights, moreover, are admitted to be monopolies which government allows for a certain length of time.² Nor is a sale of one's "good will," or even (as it is held) the promise to influence the public to deal with the buyer as the seller's successor, illegal.³ It is only in partial restraint of trade, and therefore permissible, for a seller to stipulate that he will not carry on the business within the circuit of his usual custom as then definable, or of a particular municipality.⁴ The restraint stipulated for might be

¹ Benj. Sales, bk. 3, c. 3, § 1; *Stanley v. Jones*, 7 Bing. 369; 4 Bl. Com. 134, 135; *Hutley v. Hutley*, L. R. 8 Q. B. 112; U. S. Digest, 1st Series, "Champerty;" *Sedgwick v. Stanton*, 4 Kern. 289; *Scott v. Harmon*, 109 Mass. 237.

² *Hinde v. Gray*, 1 M. & G. 195; *More v. Bonnet*, 40 Cal. 251; *Lange v. Werk*, 2 Ohio St. 519; Benj. Sales, bk. 3, c. 3, § 1; *Mumford v. Gething*, 7 C. B. n. s. 305; *Story Sales*, §§ 492, 493; *Crawford v. Wick*, 18 Ohio St. 190; *Dean v. Emerson*, 102 Mass. 480; *Erie R. R. Co. v. Union Locomotive Co.*, 6 Vroom, 240.

³ *Leather Cloth Co. v. Lorisont*, L. R. 9 Eq. 345; *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Morse Twist Co. v. Morse*, 103 Mass. 73.

⁴ *Hoyt v. Holly*, 39 Conn. 326 (two judges diss.); *Warfield v. Booth*, 33 Md. 63.

⁵ *Guerand v. Dandeleit*, 32 Md. 561; *Warren v. Jones*, 51 Me. 146; *Jenkins v. Temples*, 39 Geo. 655.

in time instead of space. But it would appear that restraint in space is now the only decisive cause of avoidance, since partial restraint as to space is frequently upheld, though unlimited as to time;¹ and a restraint intended to operate through the realm in Great Britain, or through the whole State as our American courts would rule it, is void, because general.² The right of one who has sold out the good-will of his business to carry on the same business in the buyer's immediate vicinity is a matter for reasonable interpretation, according to the sense of the parties ; but the seller should not be allowed to overreach the buyer in such a bargain.³

Of sales whose illegality may be said to depend more especially upon legislation, several classes may be mentioned ; such as acts against lotteries, acts requiring licenses or otherwise imposing taxes, acts regulating the sale of noxious articles, acts enforcing certain requirements as to weight and measure, inspection acts, and the like, some of which pursue a theory of morals which the common law did not clearly sanction, while others are rather to facilitate the operations of government. The courts have distinguished between statutes which expressly prohibit the transaction and those which only prohibit it by implication, as by imposing penalties for disobedience ; yet every such question must be tested by the true intent of the enactment as to rendering the contract illegal or not.⁴ Usury taints a sale, though

¹ See *Benj. Sales*, bk. 3, c. 3, § 1; *Hitchcock v. Coker*, 6 Ad. & E. 438; *Guerand v. Dandeleit*, *supra*.

² *Taylor v. Blanchard*, 13 Allen, 370; *Mallan v. May*, 13 M. & W. 511; *More v. Bonnet*, 40 Cal. 251; *Hinde v. Gray*, 1 M. & G. 195; *Lange v. Werk*, 2 Ohio St. 519.

³ See *Moufflet v. Cole*, L. R. 7 Ex. 70; *Bradford v. Peckham*, 9 R. I. 250; *Labouchere v. Dawson*, L. R. 13 Eq. 322.

⁴ *Cope v. Rowlands*, 2 M. & W. 149; *Harris v. Runnels*, 12 How. 79; 1 Sch. Pers. Prop. 705; *Benj. Sales*, bk. 3, c. 3, § 2; *Story Sales*, §§ 498, 499; *Miller v. Post*, 1 Allen, 434; *Larned v. Andrews*, 106 Mass. 435;

the policy of usury acts is a doubtful one.¹ Many other statutes which render sales void for illegality are founded upon a capricious policy, which fails to interpret truly the sense of the public, so that the courts incline to uphold the transaction. Even the imposition of a penalty may sometimes justify an inference, that not particular sales with individuals, but one's general business, shall bear the consequence of a non-compliance with the legislative enactment; as where one is required to take out a license as dealer on the basis of his average sales.²

Prominent among these classes of sales is to be mentioned that concerning spirituous and intoxicating liquors. Legislation on this subject is constantly changing in the several States, and the numerous decisions possess little more than local importance. It is settled that these statutes are not in contravention of the fundamental law of our land;³ and a broad issue for all such legislation is, as to whether the sales of liquor shall be altogether illegal, or only illegal where the seller has taken out no license.⁴

Sunday laws differ from the classes above noticed in making the day on which one contracts the occasion of avoidance rather than the purpose of the contract, though their object is still the cause of public morals. At common law, sales on Sunday seem not to have been void; but, under English statutes for the past two centuries or more, the prohibition has remained in force to this day. Similar enactments, more or less comprehensive of scope, are to be found in nearly all

Aiken *v.* Blaisdell, 41 Vt. 655; Coombs *v.* Emery, 14 Me. 404; Forster *v.* Taylor, 5 B. & Ad. 887; Tracy *v.* Talmage, 4 Kern. 162.

¹ Schermerhorn *v.* Talmage, 4 Kern. 93; 1 Sch. Pers. Prop. 304 *et seq.*

² See Larned *v.* Andrews, 106 Mass. 435; Aiken *v.* Blaisdell, 41 Vt. 655.

³ Bartemeyer *v.* Iowa, 18 Wall. 129.

⁴ See Benj. Sales, bk. 3, c. 3, § 2; Stat. 30 and 31 Vict., c. 142, § 4; Butler *v.* Northumberland, 50 N. H. 33; Dolson *v.* Hope, 7 Kans. 161; Jameson *v.* Gregory, 4 Met. Ky. 363.

of the United States, works of necessity and charity being frequently the basis of an excepting proviso.¹ The disposition is frequently shown, at the present day, to mitigate the severity of such legislation by liberally construing the Sunday laws ; and a sale void under such an enactment would appear good wherever a fresh promise passes between the parties on a subsequent day, or the execution of the bargain made on Sunday is on some other day of the week ; and the bargain may hold in favor of an innocent party, as where the execution of the contract by the one in violation of the Sunday law was unknown to the other.²

IV. Avoidance by mutual rescission. This method of terminating a sale is always open to the sale parties, who may rescind at any stage, before or after full performance of their contract, and upon whatever terms they please, provided that all who acquired rights under the sale acquiesce in the arrangement. The presumed result of rescission is, that buyer and seller are restored each to his former rights, — the seller resuming his goods if already delivered, and the buyer his purchase-money if already paid ; but in these as in other respects the parties are left free to regulate their *status* for themselves, and the proper province of court or jury is to decide upon the evidence what they really intended.³

¹ See *Benj. Sales*, bk. 3, c. 3, § 2; *Act 29 Car. II.*, c. 7, § 1; *Drury v. Defontaine*, 1 Taunt. 131; *Bloxsome v. Williams*, 6 B. & Cr. 232; *Lyon v. Strong*, 6 Vt. 219; *Smith v. Bean*, 15 N. H. 577; *Northrup v. Foote*, 14 Wend. 248; *Allen v. Gardiner*, 7 R. I. 22; *Murphy v. Simpson*, 14 B. Mon. 419; *Cranson v. Goss*, 107 Mass. 439; *Finley v. Quirk*, 9 Minn. 194; *Sayre v. Wheeler*, 32 Iowa, 559; *Story Sales*, §§ 500–502; *Pate v. Wright*, 30 Ind. 476.

² *Simpson v. Nicholls*, 5 M. & W. 702; *Harrison v. Colton*, 31 Iowa, 16; *Dickinson v. Richmond*, 97 Mass. 45; *Sumner v. Jones*, 24 Vt. 317; *Cameron v. Peck*, 37 Conn. 555; *Vinton v. Peck*, 14 Mich. 287. See *Benj. Sales*, *supra*; *Story Sales*, §§ 500–502.

³ 2 Kent Com. 504; *Morgan v. Bain*, L. R. 10 C. P. 15; *Story Sales*, §§ 415, 419, 426, 427; *supra*, p. 626. The seller's title in his chattel may

revest, notwithstanding the buyer retains possession after rescission for repairing it. *Beecher v. Mayall*, 16 Gray, 376. Mutual rescission is not to be inferred where the seller re-takes his goods by force, and notifies the buyer that he shall re-sell at the latter's risk. *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Page v. Cowasjee*, L. R. 1 P. C. 127. But the seller's simple resumption of goods unpaid for, with the buyer's concurrence, would justify the presumption of a mutual rescission. *Sloane v. Van Wyck*, 4 Abb. N. Y. App. 250.

CHAPTER XVIII.

SALES AT AUCTION.

HAVING now finished the examination of private sales, we shall devote our final chapter on the present topic to the peculiar features presented in what may well be called, by way of contrast, public sales ; for a sale at auction, instead of bringing buyer and seller together as individuals to make a private contract on their own terms, puts the seller forth to the public with his goods as undertaking openly to close a bargain with such a party as may on a certain occasion offer the largest price in presence of the other competitors.

A sale at auction is a public sale of property to the highest bidder ;¹ and as the essential characteristic of such sales is the open selection by the seller, or his agent, of the highest from a number of bidders, the method of conducting an auction by public outcry, now almost universal, seems not indispensable. Thus, where the seller invites each bidder to put down his sum on a slip of paper, these slips to be afterwards taken up, and he whose paper contains the largest sum to be declared the purchaser, — this is considered essentially a sale at auction.² Nor is the method of selling by outcry invariable. As regularly conducted in England and America, the auction progresses from the lowest to the highest bid, closing with the last ; but, in a Dutch auction, the procedure is

¹ Bouv. Dict. " Auction ; " Story Sales, § 460.

² Attorney-General *v.* Taylor, 13 Price, 636. But whether this should be termed an auction sale, unless openly conducted, and affording the public an opportunity to compete, *quære*.

reversed, — the property being set up above its value, and the price gradually lowered till some one takes it.¹

Our leading topics are, — (1st.) Auctioneers, their rights and duties; (2d.) Preliminaries of the auction sale, including terms and conditions; (3d.) Method of conducting the auction; (4th.) Fraud in the biddings; (5th.) Enforcement of the auction contract.

(1st.) Auctions are, in general, conducted by a class of persons duly licensed upon giving a bond, and empowered to sell the property of others at public sale for a commission on the proceeds. By virtue of his employment; an auctioneer is solely the agent of the seller of goods until the bargain is struck with the buyer, and then he becomes the agent of the buyer likewise for certain limited purposes. As the seller's agent, he is responsible to him, as any bailee for hire, for ordinary diligence and skill in the storage of the goods confided to him, but is not liable for inevitable accidents.² He is also bound, like other agents, by the seller's special instructions regarding terms and conditions of sale, in other respects observing the custom of trade; but in no case, without express authority, can he dispose of the goods at private sale.³ On the other hand, he is under obligations to the public, and must conduct his sale honorably, and according to the terms he offers; and any instructions given by the

¹ See Lord Mansfield, in *Bexwell v. Christie*, 1 Cowp. 395.

² *Story Sales*, §§ 79, 459, 472; *Maltby v. Christie*, 1 Esp. 340; *Commonwealth v. Passmore*, 1 S. & R. 217. Deputy-sheriffs are often, *virtute officii*, brought within the same rules as auctioneers. See *St. Louis Church v. Bonneval*, 13 La. Ann. 321; *M'Mechen v. Baltimore*, 3 Har. & J. 534; *Davis v. Commonwealth*, 3 Watts, 297. That an auctioneer's license does not permit him to carry on the additional business of pawnbroker, see *Hunt v. Philadelphia*, 35 Penn. St. 277. See Eng. Stat. 8 and 9 Viet. c. 15, which requires an auctioneer to display his license at the place of auction.

³ *Bexwell v. Christie*, 1 Cowp. 395; *Marsh v. Jelf*, 3 F. & F. 284; *Williams v. Poor*, 3 Cr. C. C. 251; *Steele v. Elmaker*, 11 S. & R. 86; *Bush v. Cole*, 28 N. Y. 261.

seller which would operate as a fraud upon open bidders must be disregarded, or the employment refused.¹ A verbal authority makes one an auctioneer for the seller.²

The auctioneer's authority is a personal one at the common law, and cannot be delegated to others.³ But custom and local statutes modify the rule; and it is not unusual for an auctioneer to employ another to make the outcry and use the hammer under his own immediate direction and supervision; and for matters incidental to the public vendue, as in storage and delivery of the goods, or clerical services rendered while the auction progresses, and at other times, the employment of clerks and porters is as common as in other kinds of business.⁴ Even the auctioneer's absence during part of the time occupied by an auction which proceeds under his supervision is held not to invalidate the sale.⁵

The common rules of agency are applicable to an auctioneer. Thus, if he deviates from his principal's special directions, he is liable to his principal for the consequences; and, under such circumstances, he may be also bound personally to the buyer in the contract.⁶ An auctioneer's general employment is not sufficient notice to the public that he acts only as agent; it would appear that he may auction off property of which he is owner;⁷ and hence he makes himself personally responsible to the buyer for all damage under the contract, unless, prior to concluding the

¹ Story Sales, § 79. See *Mainprice v. Westley*, 6 B. & S. 420.

² *Yourt v. Hopkins*, 24 Ill. 326.

³ *Stone v. State*, 12 Mis. 400; Story Sales, §§ 79, 475; *Pierce v. Corf*, L. R. 9 Q. B. 210.

⁴ *Commonwealth v. Harnden*, 19 Pick. 482; *Poree v. Bonneval*, 6 La. Ann. 386; *Bird v. Boulter*, 4 B. & A. 443; *Johnson v. Buck*, 6 Vroom, 38; *Harvey v. Stevens*, 43 Vt. 653.

⁵ *Commonwealth v. Harnden*, *supra*.

⁶ *Bush v. Cole*, 28 N. Y. 261; *Steele v. Ellmaker*, 11 S. & R. 86; Story Sales, § 477.

⁷ *F'lint v. Woodin*, 9 Hare, 618.

bargain, he discloses the real seller's name; though, if he has followed his principal's directions, he has his own remedy against the latter.¹ An owner, too, who revokes his auctioneer's authority, as he may do at any time before the sale, must indemnify the agent against liabilities already contracted in the due course of his employment; while, if the latter has meantime regularly concluded a bargain, the former cannot set it aside regardless of the buyer's wishes.² Any one who gets an auctioneer to sell his goods by thrusting them upon him surreptitiously, as part of those belonging to another party for whom the auction is made, perpetrates a fraud upon both auctioneer and buyer.³ Disobedience of the principal's instructions may be cured by the principal's ratification upon full knowledge of the facts.⁴ In short, the auctioneer sustains, as to the seller, the character of a special agent, with the usual rights and liabilities incidental to that relation.⁵ So long as his special interest in the goods continues, he may sue seller or buyer when needful; and his possession of the goods for the purposes of the sale justifies him in maintaining trespass, trover, or replevin, against any third party who would wrongfully intermeddle or take them away.⁶

An auctioneer must take heed not to sell what he has no right to offer. Where he receives notice at any time before closing a bargain that what he has offered for sale does not belong to the principal, he incurs a personal risk by going on with the sale.⁷ Even a sheriff who sells goods taken in

¹ *Franklyn v. Lamond*, 4 C. B. 637; *Mills v. Hunt*, 20 Wend. 431; *Story Sales*, §§ 81, 477-480; *Thomas v. Kerr*, 3 Bush, 619; *Schell v. Stephens*, 50 Mis. 375.

² *Warlow v. Harrison*, 1 E. & E. 295; *Manser v. Back*, 6 Hare, 443.

³ *Thomas v. Kerr*, 3 Bush, 619.

⁴ *Story Sales*, § 473.

⁵ See *Story Sales*, § 470.

⁶ *Story Sales*, §§ 471, 474; *Williams v. Millington*, 1 H. Bl. 81. But as to selling fixtures upon another's premises, see *Davis v. Danks*, 3 Ex. 435.

⁷ *Hardacre v. Stewart*, 5 Esp. 103; *Adamson v. Jarvis*, 4 Bing. 66.

execution, implies, in offering them, that he *bona fide* believes that he has a title to dispose of.¹ But any party who stops an auction sale on the allegation of title in another may be sued in damages for tort if it appears that such allegation was not honestly made.² As to the auctioneer himself, if in this, as in any other instance, he connived at a fraud in offering the disputed goods for sale, he not only makes himself personally responsible to the true owner or buyer for the consequences, but is unable to sue his confederate, though it were the seller himself, for reimbursement; while, if he was honestly deceived in the title which proves defective, he has his remedy over against the principal, though personally responsible in the first instance.³

Auctioneers are entitled to compensation, usually in the shape of a commission upon the sale; to which may be added the special disbursements and expenses incidental to each particular transaction, and sometimes an extra allowance for extraordinary services beyond merely selling at auction, though nothing exorbitant; this whole subject being largely regulated by local statute and the special contract between the auctioneer and his principal.⁴ But an auctioneer may lose his commissions, and render himself liable in damages besides, for negligence on his part whereby the sale is rendered nugatory.⁵ Wherever the auctioneer, like any other employed selling agent, is the efficient cause of the sale, in bringing the parties together who become buyer and seller, as by offering the goods by advertisement, showing them, or

¹ *Peto v. Blades*, 5 Taunt. 657.

² *Like v. McKinstry*, 3 Abb. N. Y. App. 62.

³ *Story Sales*, § 481.

⁴ *Simpson v. Margitson*, 11 Q. B. 23; *Maltby v. Christie*, 1 Esp. 340; *Clark v. Smythies*, 2 F. & F. 83; *Grimshaw v. Atterwell*, 8 C. & P. 6; *Hunt v. Philadelphia*, 35 Penn. St. 277; *Harlow v. Sparr*, 15 Mis. 184; *Russell v. Miner*, 5 Lans. (N. Y.) 537.

⁵ *Denew v. Daverell*, 3 Camp. N. P. 451; *Story Sales*, § 470. As to the auctioneer's lien, see 1 Sch. Pers. Prop. 484 *et seq.*

referring an inquirer to his principal, and is not chargeable with ignorance or carelessness to the principal's injury, he may justly claim his compensation from the seller; and the latter cannot, on the plea that he had countermanded the authority given, or that the auction failed and the sale was privately made, evade giving a remuneration.¹ The validity of the contract to purchase, as between buyer and seller, is sometimes found to affect the auctioneer's right to recover compensation.²

(2d.) As to the preliminaries of an auction sale. Public notice is given, commonly by advertisement or posters, of the time and place of sale, the subject-matter, and such other facts as may be essential. Advertising a sale of articles by auction does not amount to a contract with the public, or any party acting upon the advertisement, that there will be a sale of those articles; nor can one who makes a journey, or otherwise incurs expense, on the faith of an auction which does not take place as honestly advertised, sue the auctioneer in damages.³ So a party may advertise to receive offers, without thereby implying a promise to sell to the party who shall make the highest offer.⁴

Terms or conditions of the sale published previous to the auction enter into the sale on the seller's part; and these every bidder is supposed to make an element of his offer. Terms and conditions, not only as to time, place, and the auctioneer employed, but in less obvious particulars and with special provisions, go primarily by the published advertisement or posters of the auctioneer; and upon all parties with due notice thereof they are binding. Standing rules of

¹ *Clark v. Smythies*, 2 F. & F. 83; *Green v. Bartlett*, 14 C. B. N. S. 681.

² *Johnson v. Buck*, 35 N. J. Law, 338.

³ *Harris v. Nickerson*, L. R. 8 Q. B. 286.

⁴ *Spencer v. Harding*, L. R. 5 C. P. 561.

the auction-room may thus be brought to a bidder's knowledge, so as to form part of the contract; as, at a horse repository, a printed regulation conspicuously posted setting forth that no warranty of soundness would remain in force longer than twenty-four hours from the sale.¹ It is a rule, that printed or written conditions of sale so speak for themselves that they cannot be contradicted by the auctioneer's verbal declarations at the sale, nor by the bidder with knowledge thereof.² Nor matters it that the question comes up at a sub-sale of the same subject-matter by the purchaser.³ But the auctioneer's oral statements, made at the time of the sale and before opening bids, in explanation of the written or printed terms, are sometimes admissible under the usual rules of evidence; so, too, might the sale be orally adjourned, or certain advertised articles be removed from competition.⁴ And one who hears the auctioneer say publicly, before putting an article up for sale, that the certain published statement as to its character is wrong in a certain particular, making the needful correction, is held to his bid, if accepted, and cannot set up the printed terms against the verbal correction.⁵

But the bidder may strenuously insist that no term or condition shall prevail to his disadvantage which was not fairly brought to his own personal knowledge by advertisement, poster, the auctioneer's public statement made at the sale, or the auction usage; and particularly is it incumbent upon a seller, who would hold the bidder to his bargain, to see to it

¹ *Bywater v. Richardson*, 1 Ad. & E. 508. And see *Story Sales*, § 463; *Lamond v. Davall*, 9 Q. B. 1030; *Hagedorn v. Laing*, 6 Taunt. 162; *Plume v. Small*, 1 Halst. Ch. 460, 650.

² *Ib.*; *Gunnis v. Erhart*, 1 H. Bl. 289; *Shelton v. Livius*, 2 C. & J. 411; *Powell v. Edmunds*, 12 East, 6.

³ *Shelton v. Livius*, *supra*.

⁴ See *Rankin v. Matthews*, 7 Ire. 286; *Harris v. Nickerson*, L. R. 8 Q. B. 286.

⁵ *Eden v. Blake*, 13 M. & W. 614. Cf. *Shelton v. Livius*, 2 C. & J. 411.

that the auctioneer's special regulations, rules, or oral explanations and corrections, were amply offered to the bidders before the bidding was started. Where an auctioneer announces terms at the auction sale which in ordinary course should have appeared in the published notice, distributing no copies of such announcement among the bidders, he incurs great risk; for auction sales have been set aside at the instance of the accepted bidder who could show that such change or addition to the terms of the published notice was unknown to him, because he was somewhat deaf.¹

Conditions of an auction sale are to be reasonably construed, and, though not contrary to their plain intent, yet with reference to the mutuality of the contract. Thus where a house and the land it occupies are separately sold, on condition, as to the former, that it shall be removed from the premises within a certain date, one who bids in both house and land for himself is not bound to perform the condition.² Nor, under an auction with any misdescription as to quantity conditioned to be at the purchaser's risk, will it be presumed that a large deficiency in quantity was meant to be borne by him without the right to rescind, or even to claim deduction from the price.³ A condition should be strictly construed as to the seller which professes to throw upon the buyer the burden of the former's title;⁴ and conditions requiring the goods to be removed by the buyer within a stipulated time, in default of which the goods shall be re-sold at his loss, are presumed to allow this period to the buyer only, requiring the seller to be ready to deliver the goods at any time on the buyer's reasonable request.⁵ A sale condition which reserves

¹ *Torrance v. Bolton*, L. R. 14 Eq. 124. See *Thompson v. Kelly*, 101 Mass. 291.

² *Plume v. Small*, 1 Halst. Ch. 460, 650.

³ *Whittemore v. Whittemore*, L. R. 8 Eq. 603. And see *Harnett v. Baker*, L. R. 20 Eq. 50.

⁴ See *Waddell v. Wolfe*, L. R. 9 Q. B. 515.

⁵ *Lamond v. Davall*, 9 Q. B. 1030. And see *infra*, p. 671.

to the auctioneer the power of re-sale on the buyer's default renders the sale not absolute, but conditional, as to passing the property in the goods.

(3d.) The method of conducting the auction which prevails in England and America, is for the auctioneer, at the time and place appointed, in presence of the assembled bidders, to formally open the auction, and, after making final announcement of its terms, to put up each article or lot for sale, with his hammer in his hand, asking how much he is offered for a certain thing. Any person calls out a price, meaning it as the sum he bids for it: this the auctioneer announces, repeating until he hears a higher bid; and so on, with each higher sum offered, to the *maximum* bid; then, with some such final phrase as "Going, going, gone," he brings down the hammer upon his desk, declaring that the thing is "gone" or sold to the *maximum* bidder (whose name he now takes) for such a sum. After the hammer is thus brought down the bargain is closed, by the auctioneer's virtual acceptance, on the seller's behalf, of the last bidder's proposal; and neither seller nor buyer can withdraw, though either might have retracted before the hammer fell.¹ A retraction by the bidder or auctioneer while the auction progresses should be loud enough for the other to hear it.² Any party may bid personally, or by his agent; but where one bids for another, without disclosing, either to the auctioneer or the owner, the name of his principal, he is liable as purchaser.³

Sales at auction are, as we have seen, within the Statute of Frauds; so that often a written memorandum should be made at or soon after accepting the bid, in order to hold

¹ See Story Sales, § 461; *Payne v. Cave*, 3 T. R. 148.

² Story Sales, § 461.

³ *M'Comb v. Wright*, 4 Johns. Ch. 659; *National Fire Ins. Co. v. Loomis*, 11 Paige, 431; *Warlow v. Harrison*, 1 E. & E. 295.

the parties to the bargain.¹ This memorandum should comprise all essential terms and conditions, and, in general, conform to the principles already discussed.¹ The fact that the law imposes upon auctioneers the duty of making memoranda of their sales, and the presumption in favor of the performance of one's official duty, cannot, it is held, stand for proof that there was a written memorandum of the sale.² But a deposit is frequently required from the purchaser at the completion of an auction sale by way of indemnity to the seller, and for securing compliance with the Statute of Frauds; and the requirement of such deposit is properly one of the published conditions of the auction. If the auctioneer waive such condition, the statute in this respect may fail also of compliance.³ When the goods are knocked down to the bidder, the auctioneer is agent for both buyer and seller for the purpose of making the statute memorandum.⁴

While an auctioneer does not ordinarily warrant that which he puts up at auction, he may bind himself to the purchaser by a personal warranty as to quality or title; and an express warranty, either on his own or the seller's behalf, is not unfrequently given to stimulate competition.⁵ The verbal warranty of an auctioneer, where he alone was trusted, is an original undertaking, and not within that provision of the Statute of Frauds which requires a collateral undertaking to be expressed in writing.⁶

¹ *Kenworthy v. Schofield*, 2 Dow & R. 556; *Burke v. Haley*, 2 Gilm. 614; *Brent v. Green*, 6 Leigh, 16; *Morton v. Dean*, 13 Met. 385; *Pike v. Balch*, 38 Me. 302; *supra*, p. 537.

² *Baltzen v. Nicolay*, 53 N. Y. 467 (Church, C. J., Grover and Peckham, JJ., diss.).

³ *Ib.* See *Bleeker v. Graham*, 2 Edw. Ch. 647.

⁴ *Story Sales*, § 80; *supra*, pp. 537-539.

⁵ See *Dent v. Grath*, 3 Bush, 174; *Barclay v. Tracy*, 5 W. & S. 45; *supra*, p. 330.

⁶ *Schell v. Stephens*, 50 Mis. 375.

Since one's parol license to enter land is revocable at any time, an auctioneer who is employed to sell goods on premises not his own, nor those of the seller, has no such interest in the goods as to render the license irrevocable, even though he may have incurred expense in consequence: he should secure a suitable instrument in writing before holding the auction.¹ And a condition that the thing sold shall be removed by the purchaser from the premises within a certain period from the day of sale must be fulfilled, else the sale is voidable at the seller's option.²

(4th.) Every auction should be fairly conducted, and open to honest competition. Fraud on either side will vitiate a public sale at the option of a defrauded party who is himself free from blame. But, following the usual rules, the sale is to be pronounced voidable, and not void; so that if the defrauded party fails to rescind the sale promptly on learning of the fraud, or takes the benefits of the bargain, he must abide by the transaction; while it must appear under any circumstances that the wrongful conduct of the one caused the other to bid higher than he would have done, or otherwise induced him to act to his disadvantage.³

Fraud on the part of bidders often consists in a ring or combination of individuals for the purpose of keeping the bids in their own hands, and preventing open competition; as by agreeing that only one shall bid for each article, and that the proceeds of the auction shall be divided among them-

¹ *Taplin v. Florence*, 10 C. B. 744.

² This rule applies though the seller be a city. *Woodward v. City of Boston*, 115 Mass. 81.

³ See *Morehead v. Hunt*, 1 Dev. Eq. 35; *Story Sales*, §§ 462, 476; *Backenstoss v. Stahler*, 33 Penn. St. 251; *McDowell v. Simms*, Busb. Eq. 130; *Veazie v. Williams*, 8 How. (U. S.) 134; *Martin v. Ranlett*, 5 Rich. 541; cases *infra*. Whether certain proceedings at an auction sale prevented fair competition or not is sometimes left to a jury. *Pike v. Balch*, 38 Me. 302.

selves. Such a combination is pronounced in certain instances an indictable conspiracy under English statutes; and all agreements which tend to monopolize proposals are to be discouraged for the sake both of the seller and open bidders, whether civil or criminal procedure be invoked.¹ It is even fraudulent for one bidder to dissuade others from bidding against him on the pretence that the seller had wronged him, and that the article put up is rightfully his own.² But the mere attempt of one or more parties to stifle competition cannot invalidate the sale where the attempt proved unsuccessful.³ Nor, at the present day, do combinations of bidders appear to be so unfavorably regarded as in some of the earlier cases; for, while it would appear that all bidding associations were formerly deemed of fraudulent character because of their tendency, the rule now prevailing is, that persons intending to purchase must not agree not to bid against each other, nor undertake to stifle honest competition, but that otherwise they may join to make a purchase *bona fide* for their common benefit, and, if need be, unite to become joint-purchasers of that which no one would wish to buy in for himself alone.⁴ As auction property may be bought in for co-owners, partners, or a company, so may the parties authorize one person to bid for it on behalf of all.⁵

Fraud on the part of the seller or auctioneer may be alleged where puffers or by-bidders are secretly employed to force

¹ *Levi v. Levi*, 6 C. & P. 239; *Fuller v. Abrahams*, 3 B. & B. 116; *Kearney v. Taylor*, 15 How. 494; *Smith v. Greenlee*, 2 Dev. 136; *Slater v. Maxwell*, 6 Wall. 268; *Fenner v. Tucker*, 6 R. I. 551; *Gulick v. Ward*, 5 Halst. 87; *Wilbur v. How*, 8 Johns. 444; *Wooton v. Hinkle*, 20 Mis. 290; *Nat. Bank v. Sprague*, 20 N. J. Eq. 159; *Loyd v. Malone*, 23 Ill. 43; *Gardiner v. Morse*, 25 Me. 140; *Martin v. Ranlett*, 5 Rich. 541.

² *Fuller v. Abrahams*, 3 B. & B. 116.

³ *Haynes v. Crutchfield*, 7 Ala. 189.

⁴ See *Carew in re*, 26 Beav. 187; *Kearney v. Taylor*, 15 How. 494, *per* Nelson, J.; *Phippen v. Stickney*, 3 Met. 384; *Wooton v. Hinkle*, 20 Mis. 290; *Loyd v. Malone*, *supra*; *Bradley v. Kingsley*, 43 N. Y. 534.

⁵ *Nat. Bank v. Sprague*, *supra*, 20 N. J. Eq. 159.

competition above its true level, and make the thing sell for more than it would fetch were the auction fairly conducted; and any party, who has been misled by a fictitious bid so procured into offering more than he would otherwise have bid, may refuse to complete the contract, or claim relief against any purchase closing upon his offer;¹ for such employment is a fraud upon honest bidders. The English chancery practice appears to have been more lenient, allowing one puffer in a chancery sale in order to prevent a sacrifice; but the courts of law refused to accede to this doctrine. Statute 30 and 31 Vict., c. 48, at length required equity in sales of land to conform to the legal rule.² The latest chancery cases tend to discredit this practice irrespective of legislation, and hold that where there are two by-bidders, counting the auctioneer as one, the auction is fraudulent.³ In this country the common-law rule against employing a single puffer generally prevails,⁴ but not universally.⁵ An auctioneer should not run up the price by pretending to receive bids not actually made.⁶ The purchaser who would escape the bargain because of by-bidding should, of course, have been misled thereby;

¹ *Bexwell v. Christie*, 1 Cowp. 395; *Howard v. Castle*, 6 T. R. 642; *Thornett v. Haines*, 15 M. & W. 367; *Green v. Baverstock*, 14 C. B. N. S. 204; *Moncrief v. Goldsborough*, 4 H. & M. 281; *Morehead v. Hunt*, 1 Dev. Eq. 35; *Staines v. Shore*, 16 Penn. St. 200; *Towle v. Leavitt*, 3 Fost. 360; *Nat. Bank v. Sprague*, 20 N. J. Eq. 159; *Story Sales*, § 484; *Benj. Sales*, bk. 3, c. 2, § 3. But see *Latham v. Morrow*, 6 B. Monr. 630.

² See *Green v. Baverstock*, *supra*; *Flint v. Woodin*, 9 Hare, 618; *Benj. Sales*, bk. 3, c. 2, § 3; *Veazie v. Williams*, 3 Story, 632; s. c. reversed, 8 How. (U. S.) 134.

³ *Mortimer v. Bell*, L. R. 1 Ch. 10 (1865).

⁴ See 2 Kent Com. 538, 539, *Staines v. Shore*, and *Towle v. Leavitt*, *supra*.

⁵ *Phippen v. Stickney*, 3 Met. 384; *Reynolds v. Dechaums*, 24 Tex. 174.

⁶ See *Veazie v. Williams*, 8 How. 134 (Taney, C. J., M'Lean and Grier, JJ., diss.).

and he should act promptly upon his discovery, and comply with the terms usual in repudiating a bargain for fraud.¹

But no owner is compelled to sacrifice his property by closing with the highest bidder. He can limit his price in advance of the auction, and direct the auctioneer not to let it go for less; and if the auctioneer, in disregard of such instructions, closes a bargain, instead of adjourning the auction or withdrawing the goods for want of a proper bid, he makes himself responsible to his principal for the consequences.² So may the seller openly reserve the right to bid at the auction for himself; since it is the secret and false bid which injures competition.³ But while a bid thus made by the seller for his own protection is proper, and the courts are further disposed to let a sale stand, wherever the seller has merely put in the last bid and the auctioneer has knocked the goods down to him, although his intention of doing so had not been openly announced, it is a seller's duty to let the property go to others where the sale was published as being "without reserve;" for a sale "without reserve" implies that the highest *bona fide* bid from among the public competitors shall be accepted.⁴

The auctioneer should make no private arrangement with any party for signalling bids; nor smuggle into the auction for one person the goods of another, since a party might increase his bid out of personal regard for the advertised

¹ See *Tomlinson v. Savage*, 6 Ired. Eq. 430; *Backenstoss v. Stahler*, 33 Penn. St. 251.

² *Steele v. Ellmaker*, 11 S. & R. 86; *Towle v. Leavitt*, 3 Fost. 360; *Bush v. Cole*, 28 N. Y. 261.

³ *Dimmock v. Hallett*, L. R. 2 Ch. 21; *Mainprice v. Westley*, 6 B. & S. 420; *Story Sales*, § 484; *Staines v. Shore*, 16 Penn. St. 200, *per* Gibson, C. J.

⁴ See *Robinson v. Wall*, 2 Ph. 372; *Thornett v. Haines*, 15 M. & W. 367; *Warlow v. Harrison*, 1 E. & E. 295. But see *Dimmock v. Hallett*, L. R. 2 Ch. 21, as to a sale "without reserve," but with all parties free to bid. As to inadequacy of price, see *Livingston v. Byrne*, 11 Johns. 555.

owner; nor give advantages to one over another fair and open bidder.¹ It is not absolutely fatal to the auction that more was offered than the property was cried off for; and the practice has been justified in some States of putting up the property again at the price bid, where it is fairly claimed by two or more persons, and so deciding finally who is entitled to the purchase.²

(5th.) Enforcement of the auction contract is the last topic for consideration. In the absence of special announcement to the contrary, chattel sales at auction are for cash; and an auctioneer runs a personal risk if he delivers the goods without receiving the price from the purchaser;³ or if he takes, by way of payment, a promissory note instead of money.⁴ But where custom or the seller's express agreement has given to the auctioneer a wider discretion as to the time or mode of payment, he may exercise it with a corresponding modification of his personal liability.⁵ On the other hand, the authority conferred may be so restricted in a sale as to give the auctioneer no right to receive payment, especially if the principal retains possession of the goods.⁶ So might a seller revoke his auctioneer's authority, even after the auction, and, in the exercise of prudence, take the matter of delivery and receiving payment into his own hands; though not so as to deprive the auctioneer of his lien for compensation, nor without giving the buyer ample notice of the revocation.⁷

¹ Conover v. Walling, 2 McCart. 173; Thomas v. Kerr, 3 Bush, 619.

² Conover v. Walling, *supra*. And see McMasters v. Commissioners, 1 La. Ann. 11, which declares that one of the disputants who re-bids must abide by the result, even though the goods are finally knocked down to a third person.

³ Brown v. Stanton, 2 Chit. 353.

⁴ Williams v. Evans, L. R. 1 Q. B. 352. Whether an auctioneer can take a check, see 11 Mod. 87.

⁵ Townes v. Birchett, 12 Leigh, 173.

⁶ Sykes v. Giles, 5 M. & W. 645.

⁷ Girard v. Taggart, 5 S. & R. 19; Williams v. Evans, L. R. 1 Q. B. 352.

If, under the terms of the auction, a deposit was made by the purchaser, the auctioneer becomes stakeholder of both buyer and seller, and is bound to hold the money as assurance that the terms of sale shall be complied with. He cannot hand it to the seller, nor to the buyer, before the contract is completed, without standing answerable for its amount, less his own charges, to the injured party, in case the other proves delinquent.¹ An auctioneer is also bound to regard all matters brought to his notice which may affect the right to the deposit on either side ;² and, in case of great doubt, he may interplead the parties.³

The property in chattels passes to a purchaser on acceptance of his bid at auction to substantially the same effect as in private sales ; and the auctioneer cannot undertake to protect the buyer against further risks, or adjust subsequent claims which concern the latter as owner, at the seller's cost, unless expressly authorized so to do.⁴

An auctioneer may sue in his own name for the price of goods which he sold in the course of employment, unless the seller has revoked his authority ; nor should the buyer settle with the seller regardless of the auctioneer's claims.⁵ But if his own charges be paid, the auctioneer is not justified in pursuing the buyer, who has honestly arranged payment with the seller, as by setting off the price at which he bid in the goods against a debt which the seller owed him ; though the

¹ Story Sales, §§ 83, 478; *Burrough v. Skinner*, 5 Burr. 2639. If in default, he might also be liable for interest. *Gaby v. Driver*, 2 Y. & J. 549; 1 Sch. Pers. Prop. 310-321.

² See *Edwards v. Hodding*, 5 Taunt. 815. A corporation cannot enforce an auction sale of its chattels informally entered into. *Kidderminster v. Hardwick*, L. R. 9 Ex. 13.

³ *Bleeker v. Graham*, 2 Edw. Ch. 647.

⁴ *Sweeting v. Turner*, L. R. 7 Q. B. 310.

⁵ *Williams v. Millington*, 1 H. Bl. 81; *Robinson v. Rutter*, 4 E. & B. 954; *Beller v. Block*, 19 Ark. 566; *Minturn v. Main*, 7 N. Y. 220; *Flanigan v. Crull*, 53 Ill. 352; *Thompson v. Kelly*, 101 Mass. 291. But as to this right, where the auctioneer has parted with his lien, see *Coppin v. Walker*, 7 Taunt. 237; *Coppin v. Craig*, 7 Taunt. 243.

fact that nothing more is due him would not of itself debar an auctioneer from suing on the seller's behalf.¹

The accepted bidder at an auction of chattels is ordinarily bound to pay the money promptly, and take away the goods; and unless he does so, or offers to do so, he is liable for damages. Any waiver of the prescribed terms of sale, or delay for the buyer's convenience, will, if made on the seller's behalf, be strictly construed. Indeed, the rule is, independently of local statutes which enlarge the remedies of the auctioneer or owner, that, for the buyer's delinquency in complying with the auction terms, the goods may be re-sold upon reasonable notice, and the buyer held liable for the difference between the price at which his bid was accepted and the price for which the goods are re-sold, together with the expenses incidental to the re-sale.² But, in general, an auctioneer's duty is to sell for his principal; and he cannot, except in pursuance of remedies common to sale contracts, rescind a sale without authority.³ It does not lie in such an agent to dispute his principal's title, when sued for the amount of his sale;⁴ though he is so far bound to respect the rights of others, that moneys still in his hands, and not yet paid over to the seller, may be reclaimed by the buyer who discovers facts to justify his avoidance of the sale.⁵

¹ *Bartlett v. Purnell*, 4 A. & E. 792; *Grice v. Kenrick*, L. R. 5 Q. B. 340; *Minturn v. Main*, *supra*.

² *Coffman v. Hampton*, 2 W. & S. 377; *Boinest v. Leignez*, 2 Rich. 464; *Spring v. Chipman*, 6 Vt. 662. See *Hicks v. Ayer*, 5 Geo. 298.

³ *Boinest v. Leignez*, 2 Rich. 464; *Nelson v. Aldridge*, 2 Stark. 435.

⁴ *Hutchinson v. Gordon*, 2 Harring. 179.

⁵ *Stevens v. Lee*, 2 W. R. 16.

PART VII.

TITLE TO PERSONAL PROPERTY ; MISCELLANEOUS.

CHAPTER I.

INDORSEMENT AND ASSIGNMENT.

WITH respect to corporeal chattels, the subject of title or full ownership has been fully examined ; but incorporeal chattels, while subject to the same general rules of transfer, present some special points, which may now be briefly noticed. Being founded in a money debt or demand, a chattel of the latter sort may be affected by the law (1st) of indorsement, or (2d) of assignment, or (3d) of limitations.

(1st.) Of indorsement. Indorsement is a quality pertaining to bills, notes, and other negotiable instruments, and, in strictness, to none other. One who means to transfer his title in any chattel of this class, expressed to be payable to himself or order, writes his name on the back of it before delivering the instrument, mainly with the intent of passing over his title in the chattel to the fullest extent ; though a natural consequence would be to subject him to the liability of paying off the debt according to the tenor of the writing, in a certain contingency, as security for those primarily liable.¹

¹ See 1 Sch. Pers. Prop. 107, 584.

To use the mercantile phrases, an indorsement may be *in blank*, or where the indorser writes his own name simply, and thus gives his liability the widest range. It may be *in full*, or where he names the party to whom he indorses, and thus obliges the latter to sign, in turn, upon any new transfer; which might also be termed one sort of *restrictive* indorsement. It may be *restrictive* or *qualified*, even to the extent of clearing himself of all legal liability as indorser, and merely for the purpose of conferring his title; or where he indorses "without recourse." On the other hand, one party may put his name upon the back of another man's negotiable paper, not primarily to enable the instrument to be formally transferred, but for the purpose of lending his name as security, so that the other may raise money upon it elsewhere; in which case the indorser, if receiving no consideration, but signing as a favor, stands with the qualified liability of *accommodation indorser*.¹

(2d.) Of assignment. Every species of incorporeal personal property, with a few nominal exceptions, — as certain rights to litigate, whose transfer is still deemed repugnant to sound policy, or made illegal by statute,² and things with no actual or potential existence,³ — may now be assigned. Debts, claims, and demands of a money value, may, therefore, change owners; which is constantly done, though not always without pursuing formalities of a peculiar sort, based upon the theory that an incorporeal chattel requires delivery of the muniment or voucher, and of a writing of transfer besides. Equity is constantly encroaching upon the legal doctrine of assignment, and nullifying the letter of transfer requirement,

¹ See 1 Sch. Pers. Prop. 107, 584, 589, 603, where the classes of negotiable instruments are set forth at length.

² See *supra*, p. 650; *Dewitt v. Brisbane*, 16 N. Y. 508.

³ See *supra*, p. 191; *Kendall v. United States*, 7 Wall. 113; *Gragg v. Martin*, 12 Allen, 498.

out of regard to the transferring party's intent.¹ All personal property of an incorporeal character, if not negotiable, may, as a rule, be assigned by the owner at the present day; and even the transfer of a negotiable instrument by mere delivery, without the technical indorsement, has been in certain instances protected, for the transferee's benefit, on the broad basis of a transferring intent and an equitable assignment; though an assignment imports not, like an indorsement, the ability of the primary debtor to pay, but rather, if for value, the thing's genuineness, as in a corresponding transfer of corporeal property.²

In this connection, the terms "legal" and "equitable" assignments are sometimes used confusedly. The law has so far succumbed to equity, that it now lends its support and protection to the enforcement of an assignee's rights, though in practice requiring suit to be brought in the assignor's name,—a practice which local statute has largely modified. Equity, when invoked, pursues remedies after its own form. But the doctrine of legal assignment has become substantially that of equitable assignment, as concerns the right; and every transfer by assignment of incorporeal chattels, whether by deed, by writing not under seal, or by delivery of the muniment or voucher with mere words of parol transfer, is upheld in law as well as equity.³

Any act amounting to an appropriation of a particular fund, as where an order is drawn for the whole of a sum on deposit, constitutes in equity an assignment thereof, and (upon due

¹ See 1 Sch. Pers. Prop. 95, 97, 105, as to the history of assignment, and the classes of chattels now assignable; also *supra*, pp. 72, 156, 193; *Winfield v. Hudson*, 4 Dutch. 255; *Welch v. Mandeville*, 1 Wheat. 236, *per Story*, J.

² *Wolfe v. Tyler*, 1 Heisk. 313; *Stiles v. Farrar*, 18 Vt. 444; *Dyer v. Homer*, 22 Pick. 253; *Giffert v. West*, 33 Wis. 617; *Robinson v. McNeill*, 51 Ill. 225. And see *supra*, p. 383.

³ See *Allen v. Pancoast*, *Spencer* (N. J.), 68; *Welch v. Mandeville*, 1 Wheat. 236; *Hooker v. Eagle Bank*, 30 N. Y. 83.

notice to the drawee) will bind it.¹ In like manner, there may be an appropriation of the fund *pro tanto*, to the amount of an order.² But though the phraseology used is immaterial, provided the assigning intent be clear, there must be something more than a mere promise—an actual appropriation in fact, without reserving to the holder of the fund any control over it—to constitute an assignment.³ And the splitting up of a demand, though otherwise admissible in equity, is said to be ineffectual as a part assignment, without the debtor's assent, inasmuch as it subjects him to responsibilities and embarrassments not originally undertaken by him.⁴ A remittance may be specially made for paying off a certain creditor, so as to constitute an assignment of that remittance; and wherever A. owes B., and B. owes C., and it is mutually agreed that A. shall pay C. (the principle which is at the foundation of foreign exchange transactions), there is an assignment which the courts will protect.⁵ Indeed, it has long been a settled principle, that any liquidated and complete debt may be transferred by a triple arrangement, so that the debtor of the assignor shall become the debtor of the assignee, and that such an assignment is with sufficient consideration;⁶ but (subject to modern qualifications as to giving

¹ *Mandeville v. Welch*, 5 Wheat. 277; *Robbins v. Bacon*, 3 Greenl. 346; *Black v. Zacharie*, 3 How. (U. S.) 483; *McWilliams v. Webb*, 32 Iowa, 577; *Conway v. Cutting*, 51 N. H. 407; *Lin v. Pierce*, 20 Vt. 25.

² *Lewis v. Berry*, 64 Barb. 593; *Christmas v. Russell*, 14 Wall. 69; *Moody v. Kyle*, 34 Miss. 506; *Public Schools v. Heath*, 2 McCart. 22. But only upon consideration. *Alger v. Scott*, 54 N. Y. 14.

³ *Christmas v. Russell*, *supra*; *Field v. Megaw*, L. R. 4 C. P. 660; *Canfield v. Monger*, 12 Johns. 346.

⁴ *Story, J.*, in *Mandeville v. Welch*, 5 Wheat. 277. But as this assent may be implied, and notice of an assignment should always be given the debtor, the rule is not harshly enforced. See *Gibson v. Cook*, 20 Pick. 15; *Stevens v. Bowers*, 16 N. J. L. 16; *Gardner v. Smith*, 2 Heisk. 256; *McPike v. McPherson*, 41 Mis. 521.

⁵ *Harwood v. Tucker*, 18 Ill. 544; *Wiggins v. McDonald*, 18 Cal. 126.

⁶ *Ib.*; *Fairlee v. Denton*, 8 B. & C. 395; *Crowfoot v. Garney*, 9 Bing. 372; *Stiles v. Farrar*, 18 Vt. 444.

a debtor notice of assignment¹) the principle of the case requires not only a definite and existing fund or debt, but the assent of the debtor or depositary to the assignment.²

No particular form of assignment is at the present day requisite: since the only indispensable thing upon which equity has insisted is that the assignor intended to transfer, and the assignee to accept the transfer; so that the latter might be enabled to come into court, and have the full formalities on his behalf. An instrument in the form of a deed setting forth the parties, the subject-matter, and the consideration, and reciting that the one party does hereby "grant, sell, assign, and set over" the subject-matter described, and all his "right, title, property, and interest" in the same, to the other party, "to have and to hold the same" to the latter, "his executors, administrators, and assigns, to his and their use and behoof for ever," is a suitable means of making formal assignment; the instrument being properly dated and executed by the assignor, upon the addition of a power-of-attorney clause to enable the assignee to collect and recover the same, and being duly delivered.³ Some such formal writing is peculiarly appropriate to the transfer of a mere debt, claim, or demand, like wages, a legacy, or a money balance due, which is utterly without visible or tangible voucher of title; and it may well accompany the delivery of certificates of stock, bonds, letters-patent, and other muniments of title, in case one of these latter money-rights be the property assigned. But other writings manifesting by language the assigning intent are constantly accepted by the courts as sufficient, if duly delivered, without regard to any particular form of words, or even requiring the use of the word "assign," or an expression of value received,

¹ See *infra*, pp. 678-680.

² See *Kendall v. United States*, 7 Wall. 113, *per* Miller, J.; *Ford v. Garner*, 15 Ind. 298.

³ See Curt. Conveyancer, "Assignments." To execute an assignment without delivering it is insufficient. *Clark v. Boyd*, 2 Ohio, 56; *Ritter v. Stevenson*, 7 Cal. 388.

such as an order on the debtor;¹ a letter of attorney with words expressive of an assigning purpose, even though not irrevocable in terms;² or special written directions to the debtor;³ while, on the other hand, are writings which have been pronounced insufficient because indicating less than an assigning intent on the owner's part, such as the mere authority to another to collect and receive on his behalf.⁴ Assigning a security or document of title, not negotiable, by handing it over with the assignor's name indorsed on the back, is held sufficient; the indication here being, not to indorse, as in negotiable paper, but, as it would appear (especially if the word "assigned" were written), to authorize the assignee to write a formal assignment to himself over the signature.⁵ Far less than this is acceptable, however. We have shown that even gifts, transfers utterly without consideration, are now established, as to many species of incorporeal chattels, by merely delivering the security or document of title with no other writing whatever; which is a rule of application no less, but rather more, to transfers for value.⁶ There should be, doubtless, the intent to transfer title accompanying the delivery: but, upon proof of suitable intent, any assignment by word of mouth will stand, as the rule is now applied,—even, as it is held, the assignment of an account, or other incorporeal money right utterly without

¹ *Moore v. Lowrey*, 25 Iowa, 336; *Harrington v. Rich*, 6 Vt. 666; *Adams v. Robinson*, 1 Pick. 461.

² *Weed v. Jewett*, 2 Met. 608.

³ See *Hurst in re*, 7 Wend. 239; *Able v. Shields*, 7 Mis. 120.

⁴ *Green v. Ashby*, 6 Leigh, 135; *Spain v. Hamilton*, 1 Wall. 604; *Robinson v. Tipton*, 31 Ala. 595; *Ford v. Garner*, 15 Ind. 298.

⁵ See *Nevill v. Hancock*, 15 Ark. 511; *Ryan v. Maddux*, 6 Cal. 247; *Odenheimer v. Douglass*, 5 B. Mon. 107; *Henley v. Bush*, 33 Ala. 636.

⁶ *Supra*, pp. 75, 156. And see *Lacey v. Lacey*, 7 Penn. St. 251; *Crain v. Paine*, 4 Cush. 483; *Boyd v. Rockport, &c. Mills*, 7 Gray, 406. Hence one might deliver the security so as to give the transfer effect, though an assignment accompanied it which he failed to execute properly. *Mowry v. Todd*, 12 Mass. 281.

corporeal voucher; and the verbal assignment which is thus established by the conduct of the parties, as what they really meant, is at least enough to entitle the assignee to equitable protection in the courts, proper notice thereof having been given to the debtor.¹ A like principle is applicable to re-assignments;² and parol authority given by the owner to another to assign for him in writing has been pronounced satisfactory.³

The principle of an assignment being that three parties, the assignor, the assignee, and the debtor, are to be regarded in the transaction, the rights of an assignee are not taken to be perfect so long as the debtor is utterly ignored. The old-fashioned assignment viewed the three parties as standing on an equal vantage-ground of mutuality.⁴ But the modern rule pays less deference to the debtor, unless specially compelled by statute or the contract; for it is usually satisfied when simple notice of the assignment is given to the debtor. In order, then, to perfect an assignment of incorporeal personalty not of a negotiable character, there must be at least notice of such assignment given to the debtor; else, by the law of England and many of the United States, the assignee's

¹ *Crane v. Gough*, 4 Md. 316; *Pass v. McRea*, 36 Miss. 143; *Noyes v. Brown*, 33 Vt. 431; *Garnsey v. Gardner*, 49 Me. 167; *Currier v. Howard*, 14 Gray, 511; *Cleveland v. Martin*, 2 Head, 128; *Briggs v. Dorr*, 19 Johns. 95; *Galway v. Fullerton*, 2 C. E. Green, 390; *Durst v. Swift*, 11 Tex. 273.

² *Ball v. Larkin*, 3 E. D. Smith (N. Y.) 555; *Sumpter v. Tucker*, 14 Ark. 185. The doctrine of the text is affected somewhat by local statutes and practice, as applied to certain classes of personal property. But the rule is broadly applied as to strictly personal chattels; even to dispensing in most states with assignments of bonds and other specialties by instrument as solemn as the original. See *Currier v. Howard*, 14 Gray, 511; *Gillett v. Campbell*, 1 Den. 520. But see *Chadsey v. Lewis*, 1 Gilm. 153. Mortgages of personal property follow the rule. But the principle is not universally admitted as to mortgages of real estate. Cf. *Duffield v. Elwes*, 1 Bligh, N. S. 533; *Allen v. Pancoast*, 1 Spencer, 68; *Prescott v. Ellingwood*, 23 Me. 345; *Olds v. Cummings*, 31 Ill. 188.

³ *Spiker v. Nydegger*, 30 Md. 315.

⁴ *Supra*, p. 675.

rights are postponed to the subsequently acquired *bona fide* claims of creditors and purchasers against the assignor, and to all rights and equities of the debtor himself.¹ The debtor avoids the assignee's claim by *bona fide* paying the assignor before notice of the assignment; though, upon the receipt of notice, his relations are changed, and he makes payment to any other party than the assignee at his peril.² So, too, as to subsequent purchasers and creditors, whoever takes a new assignment with notice of a prior assignment to another, which carried the legal title, acquires no interest in the thing;³ while a second assignee, who takes without such notice, and gives the debtor the first notice of assignment, has the priority.³ With this qualification, an assignment is to be pronounced valid as between assignor and assignee.⁴

But it should be added, that, as concerns the rights of subsequent attaching creditors and purchasers, there are certain States which hold to the contrary; regarding the assignment as complete in itself, so far as all but the debtor himself is concerned, though without notice of the assignment; and consequently permitting the first assignee to prevent the debtor from actually paying over to a third party, regardless of the latter's notification to the debtor, by making his own title known at that late day.⁵

¹ *Dearle v. Hall*, 3 Russ. 1; *Bishop v. Holcomb*, 10 Conn. 444; *Murdock v. Finney*, 21 Mis. 138; *Clodfetter v. Cox*, 1 Sneed, 330; *Ward v. Morrison*, 25 Vt. 593; *Fisher v. Knox*, 13 Penn. St. 622; *Porter v. Dunlap*, 17 Ohio St. 591.

² *Loomis v. Loomis*, 26 Vt. 198; *Hackett v. Martin*, 8 Greenl. 77; *Goodrich v. Stanley*, 23 Conn. 79; *Murdock v. Finney*, 21 Mis. 138; *Reed v. Marble*, 10 Paige, 409; *Eastman v. Wright*, 6 Pick. 322; *Field v. New York*, 6 N. Y. 179. The rule of notice applies where an executor or trustee or corporate officer is the party to pay the debt. *Parks v. Innes*, 33 Barb. 37; *Thayer v. Lyman*, 35 Vt. 646; *Hercules Ins. Co. in re*, L. R. 19 Eq. 302.

³ *Dearle v. Hall*, and other cases *supra*.

⁴ See *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; *Bishop v. Holcomb*, 10 Conn. 444.

⁵ *Warren v. Copelin*, 4 Met. 594; *Bank of Valley v. Gettinger*, 3 W. Va. 309.

Notice to the debtor suffices without showing the security or offering evidence of the assignment, especially if the debtor asks for no proof; notice in court has been to a certain extent deemed acceptable; implied notice too, and likewise the debtor's own admissions, will charge him, not actual notice alone.¹ But, whether actual or constructive, there should be a positive notice of one's title under the assignment sufficient to put the debtor on his guard.² Nor can the want of notice to the debtor by the first assignee avail a subsequent creditor or purchaser who himself is chargeable with notice of the assignment.³ It is notice to the creditor, rather than notice to the debtor, which the rule in such a case exacts;⁴ and notice by the assignee's procurement binds as well as notice given by the assignee personally.⁵

An assignment carries with it the accruing interest or income of the principal thing assigned;⁶ and further, concerning personalty at least, the assignment of a debt, the principal thing, is presumed to include as its incident an assignment of the collateral security which the assigning party may hold to enforce payment.⁷ This doctrine is

¹ *Hercules Ins. Co. in re*, L. R. 19 Eq. 302; *Bean v. Simpson*, 16 Me. 49; *Jewett v. Dockray*, 34 Me. 45; *Buchanan v. Taylor*, Add. (Pa.) 154; *Dale v. Kimpton*, 46 Vt. 76.

² See *Kellogg v. Krauser*, 14 S. & R. 137; *Robinson v. Marshall*, 11 Md. 251; *Anderson v. Van Alen*, 12 Johns. 343; *Stewart v. Kirkland*, 19 Ala. 162; *Cahoon v. Morgan*, 38 Vt. 234.

³ *Dearle v. Hall*, 3 Russ. 1; *Bishop v. Holcomb*, 10 Conn. 444; *Creed v. Lancaster Bank*, 1 Ohio St. 1.

⁴ See *Brady v. State*, 26 Md. 290.

⁵ *Barron v. Porter*, 44 Vt. 587.

⁶ *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Gannett v. Cunningham*, 34 Me. 56. And see *Boylan v. Leonard*, 2 Allen, 407, as to the assignment of wages carrying future wages under the engagement.

⁷ *Jones v. Huggefords*, 3 Met. 515; *Waller v. Tate*, 4 B. Monr. 529; *Craig v. Parkis*, 40 N. Y. 181; *Hurt v. Wilson*, 38 Cal. 263; *Fitzsimmons' Appeal*, 4 Penn. St. 248; *Strother v. The Hamburg*, 11 Iowa, 59; *Miller v. Hoyle*, 6 Ired. Eq. 269.

subject, however, to statute modification, and the distinct agreement of the parties; and where, as in the case of pledge, and not a mere lien, the security should be in possession of the creditor, a pledgee's assignment of the debt ought to be accompanied by delivery of the pledge in order to carry the security over.¹

The rule is general in equity, that the assignee's interest in incorporeal personalty shall prevail against all persons having express or implied notice of the trust or assignment, provided the assignment is *bona fide* and for valuable consideration.² An assignment, like any transfer, may be directly impeached for fraud upon the assignor or his creditors; in which event, supposing the transfer set aside, the debtor must respond, not to the assignee, but to the assignor or original creditor, or to those representing his interest.³ But, unless the title be thus disputed, it matters not, as between debtor and assignee, what consideration was paid; for the former must respond to the same extent as before (though the fact of an assignment puts him to the exercise of greater caution on his own behalf), while the latter is the real party in interest, whether his title came by gift or sale.⁴

Under the rules of evidence, proof may be submitted to show that a transfer, — such as the indorsement in blank of a non-negotiable instrument, — which, on its face, purports an assignment carrying full title and ownership, was in reality

¹ See *Johnson v. Smith*, 11 Humph. 396; *Chapman v. Brooks*, 31 N. Y. 75; *Whittle v. Skinner*, 23 Vt. 531.

² See *Henry v. Milham*, 1 Green, 266; *Anderson v. Van Alen*, 12 Johns. 343; *Laughlin v. Fairbanks*, 8 Mis. 367; *Kennedy v. Parke*, 2 C. E. Green, 415.

³ See *Holbrook v. Burt*, 22 Pick. 546; *Lonsdale's Estate*, 29 Penn. St. 407; *Langley v. Berry*, 14 N. H. 82; *Crawford v. Brooke*, 4 Gill, 213; *Doolittle v. McCullough*, 7 Ohio St. 299; *Parmelee v. Cameron*, 41 N. Y. 392.

⁴ *Huson v. Pitman*, 2 Hayw. 331; *Horn v. Thompson*, 11 Fost. 562; *Hancock's Appeal*, 34 Penn. St. 155; *Whittaker v. Johnson*, 10 Iowa, 161; *Belden v. Meeker*, 47 N. Y. 307.

only a transfer as security for a loan of money, or otherwise by way of mere bailment or trust;¹ for assignment may be for a special purpose, as concerns all parties affected by notice thereof.² Negotiable paper follows the rule of indorsement, where applicable; not that of assignment.³

But what is the assignee's position under a valid assignment? To use the common phrase, he stands in the assignor's shoes: that is to say, he takes the incorporeal money-right, subject in general to all equities and offsets which at the time of assignment prevailed against his assignor; acquiring no more and no less than the assignor's rights, save so far as qualified by the debtor's failure to receive immediate notice of the assignment. For no one can transfer a better right than he himself possesses. This rule is of universal application to assignments.⁴ It is further held; notwithstanding the distinction taken by some authorities between "latent equities," so called, and those prevailing between the original parties to the instrument, that the equities existing between the assignor and assignee of incorporeal personalty attend the title transferred to a subsequent assignee for value and without notice, the latter taking the exact position of his seller.⁵

It follows that the assignor will not be allowed to impair or defeat his *bona fide* assignee's rights, whether the assign-

¹ *Baldwin v. Ely*, 9 How. (U. S.) 580; *Gerrish v. Sweetser*, 4 Pick. 374; *Owens v. Miller*, 29 Md. 144; *Cuthbert v. Wolfe*, 19 Ala. 373. And as to the interpretation of particular assignments, see U. S. Digest, 1st Series, "Assignment," §§ 351-523. ² *Ib.*

³ See *Harris v. Clark*, 3 Comst. 115; *Lunt v. Bank of North America*, 49 Barb. 221; *Cushman v. Haynes*, 20 Pick. 132; *supra*, p. 672.

⁴ *Bush v. Lathrop*, 22 N. Y. 535; *Ketchum v. Foot*, 15 Vt. 258; *Scott v. Shreeve*, 12 Wheat. 605; *Smith v. Rogers*, 14 Ind. 224; *Leathers v. Carr*, 24 Me. 351; *Decker v. Adams*, 4 Dutch. 511; *Faull v. Tinsman*, 36 Penn. St. 108; *Shotwell v. Webb*, 23 Miss. 375; *Jack v. Davis*, 29 Geo. 219.

⁵ *Bush v. Lathrop*, 22 N. Y. 535. See *Ohio Life Ins. Co. v. Ross*, 2 Md. Ch. 25; *Davis v. Barr*, 9 S. & R. 137.

ment be enforceable at law, or only in equity;¹ that the assignee of incorporeal personalty will be protected against the assignor's hostile acts and declarations subsequent to the transfer;² and that, the transfer once made, the assignor's right of subsequent interference without his assignee's consent is limited to the right of requiring indemnity against costs in proper cases where suit is brought on the debt or demand in his name by the assignee, and preventing experiments from being made at his risk in a litigation which concerns the debtor and assignee only.³

The assignee's rights against the debtor, too, are virtually those of the assignor previous to the assignment. Notice of the assignment of incorporeal personalty not negotiable, given by the assignee to the debtor (which has been shown essential to the transfer of a full title), fixes the latter's liability from the time he gets the notice, and cannot defeat any equity or offset then existing.⁴ But it appears to be the duty of the debtor, upon receiving notice, to inform the assignee promptly of such equity or offset on his part as is evidently unknown to the latter.⁵ After receiving notice under a *bona fide* assignment, the debtor must make payment to the assignee, and recognize him as owner, until correspondingly notified of a sub-assignment and further change of ownership;⁶ and

¹ *Chapman v. Haley*, 43 N. H. 300; *Blin v. Pierce*, 20 Vt. 25; *Parker v. Kelly*, 10 Sm. & M. 184.

² *Kimball v. Huntington*, 10 Wend. 675; *Halloran v. Whitcomb*, 43 Vt. 306.

³ *Reed v. Nevins*, 38 Me. 193; *Gordon v. Drury*, 20 N. H. 353. But as to fraudulent assignees, see *Atkinson v. Runnells*, 60 Me. 440.

⁴ *Leahi v. Dugdale*, 34 Mis. 99; *Huntington v. Porter*, 32 Barb. 300; *Kugler v. Taylor*, 19 La. Ann. 100; *supra*, p. 678.

⁵ See *Scott v. Jones*, 1 Brock. 244; *Hercules Ins. Co. in re*, L. R. 19 Eq. 302. But see *Decker v. Adams*, 4 Dutch. 511. *Qu.* as to how far this duty extends, beyond an obligation on the debtor's part not to mislead the assignee to the latter's disadvantage.

⁶ *Myers v. South Feather, &c. Co.*, 14 Cal. 268; *Leahi v. Dugdale*, and other cases *supra*.

equities between himself and the assignor later than the assignment and receipt of notice are unavailable.¹

Where it becomes necessary to sue the debtor, the rule of the common law requires an assignee to sue in the name of the assignor, but for his own benefit: and there are numerous decisions which prohibit the assignee from bringing the suit in his own name upon certain non-negotiable choses; unless, indeed, an express promise has passed from the debtor to himself which may serve as the basis of the suit.² But this awkward rule, which exposes the assignor to hazard while forcing the assignee into a circuitous procedure, has been much altered under our local practice acts, so as to permit of action by the beneficial owner in his own name.³ Equity treats the assignee as the party in interest, and has afforded him relief, where it could properly take jurisdiction, in proceedings in his own name: but an assignee should not go into equity, if the law furnishes an appropriate remedy;⁴ nor is the assignor an unnecessary party to a bill in equity, if he has an interest which may be affected by the decree.⁵ What the debtor can set up in defence of the assignee's suit is substantially what might have been set up against the assignor himself.⁶

¹ See *Bartlett v. Pearson*, 29 Me. 9; *Cummings v. Fullam*, 13 Vt. 434; *Daviess v. Newton*, 5 J. J. Marsh. 89; *Upton v. Wallace*, 44 Vt. 552.

² *Pollard v. Somerset Fire Ins. Co.*, 42 Me. 221; *Skinner v. Somes*, 14 Mass. 107; *Mt. Olivet Cemetery v. Shubert*, 2 Head, 116; *Ruckman v. Outwater*, 4 Dutch. 571; *McKinney v. Alvis*, 14 Ill. 33; *De Barry v. Withers*, 44 Penn. St. 356; *Clarke v. Thompson*, 2 R. I. 146; *Smilie v. Stevens*, 41 Vt. 321. See *Reed, J.*, in *De Barry v. Withers*, *supra*, as to the debtor's express promise to the assignee.

³ *Dickinson v. Burr*, 15 Ark. 327; *Warner v. Wilson*, 4 Cal. 310; *Iage v. Bossieux*, 15 Gratt. 83; *Gordon v. Downey*, 1 Gill, 41; *Cook v. Bell*, 18 Mich. 387; *Harper v. Butler*, 2 Pet. 239; *Myers v. Davis*, 22 N. Y. 489.

⁴ *Hooker v. Eagle Bank*, 30 N. Y. 83; *Adair v. Winchester*, 7 Gill & J. 114; *Haynes v. Thompson*, 34 Miss. 17; *Dixon v. Buell*, 21 Ill. 203.

⁵ *Montague v. Lobdell*, 11 Cush. 111; *James River, &c. Co. v. Littlejohn*, 18 Gratt. 53.

⁶ See *Johnson v. Irby*, 8 Humph. 654; *Allen v. Miller*, 11 Ohio St.

Instances may arise where the assignee, who has diligently pursued his remedies against the debtor, and sustained loss, has a right to turn and pursue the assignor. But the courts are reluctant to admit, upon an assignor's part, any intention to stand as indorser or guarantor of the incorporeal thing transferred; and mutual intention is doubtless material in such an issue. Where consideration was paid the assignor, the case appears to be subject to the rule of ordinary sales as to title, genuineness, and warranty or condition precedent generally;¹ otherwise, where the transfer was gratuitous. If the assignee took the risks, and was not defrauded by the assignor, the latter is not liable; and, even supposing the assignor to have undertaken to stand towards his assignee as a guarantor, the assignee can have no recourse against him, unless he has pursued his remedies against the debtor with such diligence as the circumstances require, and without success.²

374; *Myers v. Davis*, 22 N. Y. 489; *Henry v. Brown*, 19 Johns. 49. The assignee's remedy after the assignor's death is protected; though the practice of the different States is not uniform. See *Grover v. Grover*, 24 Pick. 261; *Moar v. Wright*, 1 Vt. 57; *Seeley v. Seeley*, 2 Hill, 496; *Andrews v. Rue*, 34 N. J. L. 402.

¹ See *supra*, pp. 322, 383; *Stout v. Stevenson*, 1 South. 178; *Flynn v. Allen*, 57 Penn. St. 482; *Mackie v. Davis*, 2 Wash. (Va.) 219; *Fant v. Fant*, 17 Gratt. 11; *Emmerson v. Claywell*, 14 B. Mon. 18; *Furniss v. Ferguson*, 15 N. Y. 437.

² *Graham v. Goudy*, Add. (Pa.) 55; *Greenlee v. Young*, 1 Hayw. 3; *Weaver v. Beard*, 21 Mis. 155; *Lewis v. Hoblitzell*, 6 Gill & J. 259; *Chambers v. Keene*, 1 Met. (Ky.) 289. An express undertaking of the assignor to be liable as indorser requires demand upon the debtor and notice, customary in the case of negotiable paper. *Ellis v. Dunham*, 14 Ark. 127; *supra*, p. 673.

See further, as to transfer of stock and other species of incorporeal chattels, 1 Sch. Pers. Prop. cs. 9-13.

CHAPTER II.

LIMITATIONS.

(3d.) OUR concluding topic relates to incorporeal chattels personal, as affected by the law of limitations. Adverse possession, on some principle of prescription or limitation, appears to have been recognized in the jurisprudence of most civilized nations, unless the Jews be excepted, whose jubilee year furnished a unique substitute, — breaking up titles hostile to the true owner, yet setting the debtor free. *Interest reipublicæ ut sit finis litium* is the maxim of Roman law ; and, if policy be not a sufficient reason for leaving an old title undisturbed, the impossibility of proving ownership in any one else completes the justification of the rule. But prescription, by the theory of the common law, was only a rule of presumption ; and the uncertain tenure by which one held lands whose title must have gone back beyond the memory of man in order to rest securely was long ago felt to be a hardship calling for legislative relief. Hence were brought into use such cumbersome expedients as *finis* and common recoveries, besides temporary statutes of partial application. It was left, however, for the modern statutes of limitations to fully accomplish the needful results by putting bounds to all private litigation, whether by real or personal action ; and the parent act on this subject is the English statute of James I., passed in 1623, whose provisions have been extensively copied into the American codes.¹

¹ Stat. 21 Jac. I., c. 16 ; Bouv. Dict. " Limitations ; " Angell Limitations, c. 1 ; Wms. Pers. Prop. 370.

The Statute of Limitations affects quite differently corporeal chattels and those incorporeal or founded in a right to enforce some money right: for, in the former instance, lapse of time aids the possessor by shutting out contestants; while, in the latter, a possessor's title, though strengthened in this sense, is certainly weakened in another, or by the delay to pursue his debtor and realize the demand. Without entering into the copious details of local enactment and procedure, let us enumerate the salient points of the modern law of limitations, as applicable to personal property and the owner's title.

Concerning the general purpose of statutes of limitations, judicial opinion has varied; but, at the present day, the legislative policy is highly favored, and they are allowed to operate, not because affording a presumption of payment liable to rebuttal, but as statutes of repose: consequently the legislative intent in this instance is not to be evaded by construction.¹ Equity adopts the statute rule likewise, and, in cases within its own jurisdiction, applies by analogy the same bar which would have prevailed in a common-law action, wherever there are legal and equitable remedies pertaining to the same subject-matter;² though, in cases of exclusively equitable cognizance, chancery courts may not allow themselves to be hampered.³ Whatever cause of action

¹ 3 Pars. Contr. 61-67; *Green v. Rivett*, 2 Salk. 421; *Hart v. Prendergast*, 14 M. & W. 741; *Phillips v. Pope*, 10 B. Monr. 163; *Dickinson v. McCamy*, 5 Geo. 486; *Story, J.*, in *Spring v. Gray*, 5 Mas. 523; *Gautier v. Franklin*, 1 Tex. 732. But see *Elder v. Bradley*, 2 Sneed, 247.

² *Miller v. McIntyre*, 6 Pet. 61; *Tharp v. Tharp*, 15 Vt. 105; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Farnam v. Brooks*, 9 Pick. 212; *Murray v. Coster*, 20 Johns. 576; *Watkins v. Harwood*, 2 Gill & J. 307; *Phalen v. Clark*, 19 Conn. 421; *Harris v. Mills*, 28 Ill. 44; *Taylor v. McMurray*, 5 Jones Eq. 357; *Adams v. Guerard*, 29 Geo. 651; *Oakland v. Carpentier*, 13 Cal. 540.

³ *Ib.* See *Rundle v. Allison*, 34 N. Y. 180; *Chapman v. Butler*, 22 Me. 191.

is plainly within the operation of a limiting statute, must, in any event, be subject to the plea in defence; while in cases without its reach, the rule being rather that of prescription than limitation, lapse of time raises a presumption which might, perhaps, be overcome.¹

The period of limitation, as concerns suits upon personal property, is usually fixed by the local statute at six years, following the statute of 21 James I., c. 16, except as to specialties: that is to say, all actions of debt grounded upon contract should be commenced and sued within six years after the cause of such action accrued; unless the debt be founded upon a bond or other specialty (to which privileged class other instruments, such as witnessed notes, are in some States added), in which latter case the period is enlarged to twenty years. Legislation of this character, doubtless, may embrace every variety of civil action on contract, tort, or by procedure *in rem*; and while local statutes vary as to causes of action, and length of time, the general policy pursued in England and America is to fix twenty years as the outer limit of litigation, and make six years the usual boundary.² The Statute of Limitations begins to run, in any case, only from the time when the right of action accrued: as to bills and notes, from the date of maturity if a time was fixed, or from the date of making if expressed to be payable "on demand;"³ as to a loan of money, from the time of making it, or, if time

¹ Thorpe v. Corwin, 20 N. J. L. 311; Mattocks v. Bellamy, 8 Vt. 470.

² But the statute provision varies in different States. See Brown v. Cousens, 51 Me. 301; 3 Pars. Contr. 61, 62; Angell Limitations, §§ 79-109; Wms. Pers. Prop. 371-373.

³ 1 Sch. Pers. Prop. pp. 584-591; Pickard v. Valentine, 13 Me. 412; Angell Limitations, §§ 95-109; Larason v. Lambert, 7 Halst. 247; Hirst v. Brooks, 50 Barb. 334; Newman v. Kettell, 13 Pick. 418. As to a note payable by instalments, see Bush v. Stowell, 71 Penn. St. 208. The statute begins to run on a check from the time it is paid. Garden v. Bruce, L. R. 3 C. P. 300.

was expressly given for repayment, from the date when the obligation matured;¹ upon an open account, from the date of the last item, in absence of a particular agreement as to the time of closing the account;² and as to any claim which requires a demand to make it perfect, from the time such demand has been made; though practically, as a demand should be reasonably made if not mutually waived altogether, the courts incline to reckon from the time the creditor was entitled to make his demand.³

There are certain disabilities which prevent the statute from fully operating. These, as commonly enumerated, are the minority, coverture, or insanity of the plaintiff, his absence beyond the seas, or his imprisonment, at the time when the cause of action accrued; in any one of which cases the statute does not operate while the disability continues, but begins to run as soon as the disability is removed. The expression "beyond the seas," of the older statutes, is synonymous with "out of the country," — or, more doubtfully, "out of the State," as applied in this country, —

¹ *Hall v. Letts*, 21 Iowa, 596; *Cook v. Cook*, 19 Tex. 434. The period for interest coupons cut off from a bond is computed from the maturity of the coupon debt, not the bond debt. *Clark v. Iowa City*, 20 Wall. 583.

² *Thurston v. Maddocks*, 6 Allen, 427; *Higgs v. Warner*, 14 Ark. 192; *Sams v. Stockton*, 14 B. Mon. 232. Any item of credit on such account must have plainly arisen from mutual consent with reference to the account, and be dated accordingly. *Hodge v. Manley*, 25 Vt. 210. As to "accounts between merchants" under Stat. 21 James I., c. 16, see 3 Pars. Contr. 86 *et seq.* See *Shorick v. Bruce*, 21 Iowa, 305.

³ *Codman v. Rogers*, 10 Pick. 112; *Staniford v. Tuttle*, 4 Vt. 82; *Morrison v. Mullin*, 34 Penn. St. 12; *Keithler v. Foster*, 22 Ohio St. 27. On a breach of warranty of soundness, the statute runs from the date of the contract. *Bancum v. Streater*, 5 Jones, 70; *Rice v. White*, 4 Leigh, 474. But as to setting a contract aside for fraud, see *Sears v. Shafer*, 6 N. Y. 268; *Hunter v. Hunter*, 50 Mis. 445. Time is computed under a warranty of title from disturbance of the buyer's possession. *Gross v. Kierski*, 41 Cal. 111.

phrases which, in our later enactments, are often substituted.¹ The absence of the defendant is, in like manner, not unfrequently made a stated exception to the statute's operation.² In general, the operation of the statute cannot be arrested where it has once begun to run;³ nor can subsequent disabilities be tacked upon one or more existing disabilities already preventing the statute temporarily from operating.⁴ A temporary suspension of the statute bar may be occasioned by the death of a party.⁵

To the general rule government itself constitutes an exception, on the principle that time cannot affect the sovereign; for which reason, no claim, debt, or demand, is outlawed as to State or Federal government, without some express legislative provision to that effect.⁶ This principle is invoked more especially for the benefit of government as the party plaintiff; for the State can hardly be sued at all, except under some enabling act, and on its own terms.⁷ This sovereign exemption does not extend to municipal or other corporations, whose liability follows the usual rule in the absence of special

¹ Stat. 21 James I., c. 16; Act 19 and 20 Vict., c. 97, § 10; *Forbes v. Smith*, 11 Ex. 161; *Murray v. Baker*, 3 Wheat. 541; Ang. Limitations, §§ 192-207; *Pardo v. Bingham*, L. R. 4 Ch. 735. The exception applies to foreigners. 3 Pars. Contr. 96; *Lafonde v. Ruddock*, 13 C. B. 813; *Ruggles v. Keeler*, 3 Johns. 268; *Erschine v. Messicar*, 27 Mich. 84.

² Stat. 4 Anne, c. 16, § 19; *Gregory v. Hurrill*, 5 B. & C. 341; *Fowler v. Hunt*, 10 Johns. 464; *Bulger v. Roche*, 11 Pick. 36; *Mason v. Johnson*, 24 Ill. 159.

³ *Riggs v. Dooley*, 7 B. Mon. 236; 3 Pars. Contr. 93, 94; *Perry v. Jackson*, 4 T. R. 516; *Smith v. Newby*, 13 Mis. 159.

⁴ *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Nutter v. De Rochemont*, 46 N. H. 80; *Dugan v. Gittings*, 3 Gill, 138; *Butler v. Howe*, 13 Me. 397.

⁵ *Haupt v. Shields*, 3 Port. 247; *Rhodes v. Smethurst*, 6 M. & W. 351; U. S. Dig., 1st Series, "Limitations of Actions," III.

⁶ *Lindsey v. Miller*, 6 Pet. 666; *Peoplè v. Gilbert*, 18 Johns. 227; *United States v. Hoar*, 2 Mas. 311; *McNamee v. United States*, 11 Ark. 148; *State v. Joiner*, 23 Miss. 500; *Levasser v. Washburn*, 11 Gratt. 572; *Commonwealth v. Hutchinson*, 10 Penn. St. 466.

⁷ See 12 U. S. Stats. at Large, 765, c. 92, § 10. The State may plead the statute in defence. *Baxter v. State*, 10 Wis. 454.

legislation ; and this, too, notwithstanding the State may to a certain extent be a stockholder, or participate in its management, or stand on record as a nominal party to the suit.¹

The statute permits of breaking the period of limitations in either one of these two ways: (1st) by the debtor's part payment of what he owes ; or (2d) by such new promise or acknowledgment, written and signed by the debtor, as amounts on his part to a voluntary admission of the debt, and a legal obligation to pay it.² As to part payment, this may be made in cash, or by goods or other security or equivalent of money, and either towards the principal debt, or in full or partial payment of accruing interest ; provided only that the payment be made by the debtor or through his procurement, without act or conduct in disaffirmance of the creditor's right to treat this as an outward recognition of further indebtedness ;³ and, while the creditor may appropriate a payment towards the older of two or more debts due from the same party, he cannot give a credit without the debtor's privity, and thereby break the period at his own instance.⁴ As to the new promise or acknowledgment, legislation and the legislative policy appear to have fluctuated. Lord Tenterden's Act in England, and the corresponding enactments of numerous American

¹ Lane v. Kennedy, 13 Ohio St. 42; County of St. Charles v. Powell, 22 Mis. 525; Bank of United States v. M'Kenzie, 2 Brock. 393.

² 3 Pars. Contr. 67-79; Angell Limitations, §§ 208-234, 240-247, and appx.; Wms. Pers. Prop. 371; cases *infra*.

³ Hooper v. Stevens, 4 A. & E. 71; 3 Pars. Contr. 73-79; Lowery v. Gear, 32 Ill. 382; Wainman v. Kynman, 1 Ex. 118; Turney v. Dodwell, 3 E. & B. 136; Sigourney v. Wetherell, 6 Met. 553; United States v. Wilder, 13 Wall. 254.

⁴ Angell Limitations, 5th ed., §§ 240-247; Smith v. Simms, 9 Geo. 418; Davidson v. Delano, 11 Allen, 523; Morgan v. Rowlands, L. R. 7 Q. B. 493; Fish. Harr. Dig. 5530-5539; Phillips v. Mahan, 52 Mis. 197. Whether every new item and credit given in a mutual and running account takes the balance out of the statute, *qu.* 3 Pars. Contr. 71-73; Catling v. Skoulding, 6 T. R. 189.

States, require a written expression and the debtor's signature; but, while the main object of requiring an acknowledgment appears to be to get from the debtor something equivalent to a new promise, the decisions favor the creditor wherever he can show a writing given in the debtor's name, from which, without the perversion of language, a distinct recognition of the identical indebtedness as binding can be fairly inferred, though the debtor may not have expressly promised to pay, nor named the amount due, nor, indeed, have really intended to stop the statute from running.¹ Conditional acknowledgment is subject to the condition or qualification.²

The legal effect of this part payment or written promise, on the debtor's part, is to interrupt the period of limitations already running, and serve as the bound-post of a new period, to be measured under the statute upon a like rule of computation; and so onward, with a fresh interruption for each successive act of the kind. A debt which has become barred before a debtor's death cannot be revived by the promise of his personal representative to pay it;³ though a party has been permitted to pay his own stale indebtedness upon suitable new promise.⁴

When a debt or claim is once outlawed, the statute contin-

¹ Angell Limitations, §§ 208-234; Act 9 Geo. IV., c. 14, § 1; *Lee v. Wilmot*, L. R. 1 Ex. 364; *Norton v. Colby*, 52 Ill. 198; *Patton v. Haslinger*, 69 Penn. St. 311; *Philips v. Philips*, 3 Hare, 299; *Fish. Harr. Digest*, 5514-5527; 3 Pars. Contr. 67-73; U. S. Dig. 1st Series, "Limitations," 2847-3149; *Caldwell v. Ferrill*, 20 Geo. 94; *Bangs v. Hall*, 2 Pick. 368; *Conover v. Conover*, 1 N. J. Eq. 403.

² Angell Limitations, §§ 235-237; *Tanner v. Smart*, 6 B. & C. 603; *Belshaw v. Bush*, 11 C. B. 191.

³ *Seig v. Acord*, 21 Gratt. 365; *Huntington v. Bobbitt*, 46 Miss. 528.

⁴ *Lowery v. Gear*, 32 Ill. 382; *Lord v. Shaler*, 3 Conn. 131; *Ringo v. Brooks*, 26 Ark. 540. But the new promise is relied upon in such a case: the old one is not revived. *Carr v. Robinson*, 8 Bush, 269; *Price v. Price*, 34 Iowa, 404. Any statute acknowledgment of a debt, to fully operate, should be made before action is brought, not afterwards. *Bateman v. Pinder*, 3 Q. B. 574.

ues to run, notwithstanding any subsequent act extending the time for such suits; ¹ but the bringing of an action before the time has once expired is such an assertion of one's right as will prevent the other party from pleading the statutory bar to defeat the action, though the expiration occur while the suit is pending.² The statute applies, we may add, to plaintiff and defendant, so as to defeat equally a cause of action on the one hand, or a claim of set-off on the other; ³ though with such plain distinction of the persons, that one party sued might be able to set up the defence, and not the other.⁴

The statute in force at the time of bringing the action is the statute to be applied in a case; and hence an act of this sort might be in a measure retrospective, lengthening or shortening the time for enforcing one's money-right.⁵

Acts of limitation affect more immediately the remedy than the right itself; though the common consequence is to render the right worthless, inasmuch as the party holding it is without remedy.⁶ Hence, if one holds a debt secured by lien, pledge, or mortgage, his security protection remains, notwithstanding the time may have expired for suing upon the debt or note evincing the debt; and the security may, by sale or other suitable process, be rendered available.⁷ One claiming the benefit of the statute as a privilege must plead it; and, if the plea be proved as alleged, the opposite party

¹ *Rhodes v. Smethurst*, 6 M. & W. 351. See *Henry v. Thorpe*, 14 Ala. 103.

² *Fenwick v. Phillips*, 3 Met. (Ky.) 87; *Martin v. Martin*, 35 Ala. 560.

³ *King v. Coulter*, 2 Grant, 77; *Nolin v. Blackwell*, 31 N. J. L. 170.

⁴ *Pope v. Risley*, 23 Mis. 185.

⁵ *Brewster v. Brewster*, 32 Barb. 428; *Howell v. Howell*, 15 Wis. 55; *Marston v. Seabury*, 2 Pen. 435. See *Trapnall v. Burton*, 24 Ark. 371.

⁶ 3 Pars. Contr. 99-101; *Leffingwell v. Warren*, 2 Black, 599. An adverse right, though viciously acquired, may thus ripen. *Supra*, pp. 2-5; *Fears v. Sykes*, 35 Miss. 633; *Winburn v. Cochran*, 9 Tex. 123; *Newcombe v. Leavitt*, 22 Ala. 631.

⁷ *Williams v. Jones*, 13 East, 439; *New York v. Colgate*, 2 Kern. 140; *Alexander v. Whipple*, 45 N. H. 502. *Contra*, *Harris v. Mills*, 28 Ill. 44.

cannot escape its effect by bringing himself within one of the exceptions, unless he has set up that exception.¹ But proof of an acknowledgment of the debt, or of a new promise, within the period permitted for suit, appears to be sufficient to repel the statute defence, without requiring such acknowledgment to be averred in the pleadings.²

¹ *Dessaunier v. Murphy*, 33 Mis. 184; *Vail v. Halton*, 14 Ind. 344; *Van Dyke v. Van Dyke*, 2 Harr. (N. J.) 478.

² *Hunter v. Starkes*, 8 Humph. 256; *Esselstyn v. Weeks*, 2 Kern. 635.

PART VIII.

BAILMENT OF PERSONAL PROPERTY.

CHAPTER I.

BAILMENT IN GENERAL.

BESIDES the holder of a chattel with the right of property therein and those other elements of what we call a perfect title, there is the holder for some temporary purpose, with possession and the right of possession, but with no full right of property, or only, as it is said, a *special* property. Except it be in the fiduciary relation of trustee, executor, administrator, or guardian, which, though analogous, is commonly styled a trust, and possibly, in its broadest sense, as a substituted agent,¹ one can hardly take another's chattel short of buying, receiving as a gift, or otherwise procuring title thereto, without fully subjecting himself to the law of bailment, — a topic whose discussion may fitly close this work.

The law of bailment is usually treated as a branch of the law of contracts. *Bailment* is a word of French origin, significant of the curtailed transfer, — of delivery, or a mere handing over, which is appropriate to the transaction. Strictly speaking, there are few English and American decisions to be classified under this general head, and those relating chiefly

¹ But see *infra*, p. 696 n.

to a bailee's liability as custodian; but some of the special bailments, notably those of common carriers, have grown to be topics of immense legal importance in modern times. Our legal principles are borrowed, with little change, from the civilians, whose cumbersome method of classifying bailments our text-writers have inclined to adopt.¹ Trustees, agents, factors, warehousemen, commission-merchants, all have duties and responsibilities in the handling of goods, founded in the doctrine of bailment; and so as to carriers and inn-keepers, whose employment, however, our law subjects to peculiar rules of liability.² A seller with the goods still in his custody is a bailee after the property has passed out of him.³ One may even make himself liable as a constructive bailee upon compulsion, or because of embezzling or intermeddling with another's goods.⁴

Among the numerous definitions, more or less comprehensive, of the word "bailment," to be found in our books, perhaps this is the most fitting, — a delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished.⁵ The party deliv-

¹ See Sir Wm. Jones, *Bailm.* 36, dividing bailments into these sorts: viz., *depositum*, or deposit; *mandatum*, or commission without recompense; *commodatum*, or loan for use without pay; *pignori acceptum*, or pawn; *locatum*, or hiring, which is always with reward. This last is subdivided into *locatio rei*, or hiring, by which the hirer gains a temporary use of the thing; *locatio operis faciendi*, when something is to be done to the thing delivered; *locatio operis mercium vehendarum*, when the thing is merely to be carried from one place to another. And see *Story Bailm.* §§ 3-8. A mandatary, under the Louisiana code, is not necessarily gratuitous. *Waterman v. Gibson*, 5 La. Ann. 672.

² See 1 Sch. Pers. Prop. 485, 486.

³ *Supra*, p. 411.

⁴ See *Leavy v. Kinsella*, 39 Conn. 50.

⁵ Prof. Joel Parker, cited *Bouv. Dict.* "Bailment." And see Jones *Bailm.* 1, 117; 2 Bl. Com. 451; 2 Kent Com. 559; *Story Bailm.* § 2 and *n.* Re-delivery to the bailor is not essential, — as, *e.g.*, the case of a carrier; though some have so put the definition. So may the original purpose of delivery be for some cause interrupted; which is not inconsistent

ering is the bailor; and the party receiving, the bailee. And we find, that, according to the contemplation of recompense or no recompense, the rights and liabilities of bailor and bailee are mainly determined; three degrees of diligence and care — slight, ordinary, and great — being thus kept quite distinctly in view; and the law exacting three corresponding degrees of responsibility from the bailee, as to the thing he holds, according as the bailment is (1st) for the sole benefit of the bailor, or some other party on his side; or (2d) for the mutual benefit of bailor and bailee; or (3d) for the bailee's sole benefit.¹ So, too, are three kinds of negligence enumerated at the civil and common law, — gross, ordinary, and slight. While the standard of diligence must vary, a bailee's responsibility may be qualified in any case by the special contract of the parties;² though such qualifying contract should be strictly proved.³

In the first class of cases, and to speak with more especial reference to the bailor's undertaking to do something to a chattel gratuitously, the bailor must at least use slight care and diligence; and if positively unfaithful, or grossly negligent in the discharge of his commission, he is liable for the ill consequences. Thus one who, to oblige another, takes a large check to draw, or bill to collect, may be sued for loss, if he carelessly carries the proceeds; or instead of bringing the money in person, as he undertook to do, intrusts it to some irresponsible messenger, whereby the bailee suffers loss.⁴ Nor will the want of recompense justify him in taking the

with the above definition. Apparently any trust or agency, as concerns the care and custody of personal property, comes within the broad principle of bailment, though, for other convenient reasons, treated as a separate subject.

¹ Story Bailm. § 8.

² Story Bailm. §§ 11-40.

³ Conway Bank v. Am. Express Co., 8 Allen, 512.

⁴ Beauchamp v. Powley, 1 Moo. & Rob. 38; Colyar v. Taylor, 1 Cold. 372; Jenkins v. Motlow, 1 Sneed, 248.

trust, and then, failing within a reasonable time either to perform, or, giving the bailor full opportunity for retaking the intrusted property, to abandon the undertaking altogether.¹ It is a suspicious circumstance, that a bailee, in carrying his own and another party's chattels together, claims to have lost the other's property, and not his own;² and to needlessly expose the chattel, or use it for his own benefit instead of the bailor's, is a breach of trust.³ On the other hand, a bailee without recompense is bound to slight care, and liable for gross negligence or fraud only;⁴ nor is he bound to perform his voluntary undertaking, provided he makes the change of intent promptly known to his bailor, and causes the latter no positive injury.⁵

The gratuitous receipt of a deposit exacts, therefore, less than ordinary care from the bailee, though doubtless the measure of vigilance must vary with the nature and known value of the article;⁶ and even if the bailment be not literally gratuitous, as in the case of a bank which specially receives boxes of valuables into its vaults to accommodate its regular customers and extend its ordinary facilities with the public, the care bestowed and precautions used may be so considerable as to exempt the principal, who is no participant, from losses occasioned the bailor through the dishonest

¹ *Roulston v. McClelland*, 2 E. D. Smith (N. Y.), 60; *Persch v. Quiggle*, 57 Penn. St. 247; *Graves v. Ticknor*, 6 N. H. 537.

² *Bland v. Womack*, 2 Murph. 373.

³ *Persch v. Quiggle*, 57 Penn. St. 247; *Brooks v. Penn*, 2 Strobb. Eq. 113.

⁴ *Giblin v. McMullen*, L. R. 2 P. C. 317; *Storer v. Gowen*, 18 Me. 174; *Tompkins v. Saltmarsh*, 14 S. & R. 275; *Kemp v. Farlow*, 5 Ind. 462; *Beardslee v. Richardson*, 11 Wend. 25; *Godowsky v. M'Farland*, 3 Dana, 205; *Lamplsey v. Scott*, 24 Miss. 528; *Lobenstein v. Pritchett*, 8 Kan. 213.

⁵ See *Thorne v. Deas*, 4 Johns. 84; *M'Gee v. Bast*, 6 J. J. Marsh. 455.

⁶ *Giblin v. McMullen*, L. R. 2 P. C. 317; *Dunn v. Branner*, 13 La. Ann. 452; *Whitney v. Lee*, 8 Met. 91; *Edson v. Weston*, 7 Cow. 278; *McKay v. Hamblin*, 40 Miss. 472; *Spooner v. Mattoon*, 40 Vt. 300.

acts of his servant or employé, committed for the latter's private gain, and without the scope of his employment.¹

But transactions in which one undertakes to do something to a chattel for another are most commonly of the second class; that is to say, possession is received upon a contract of hire, and by virtue of a bailment for the mutual benefit of bailor and bailee.² Wherever one person engages another to bestow labor and service upon his chattel, or, upon compensation, to transport it or to receive it upon deposit, or for some other specified purpose, the delivery of the thing will constitute a bailment for mutual benefit, and bind the bailee receiving the chattel (excepting, of course, innkeepers and common carriers³) to the exercise of ordinary care and diligence, rendering him liable for injury to the property resulting from ordinary negligence on his part; since the medium standard is here his measure of responsibility.⁴ To this class of bailees commonly belong cattle-keepers, warehousemen, commission-merchants, factors, wharfingers, millers, special depositaries, and what we may term private carriers.⁵ If, therefore, the chattel be stolen from this mutual-benefit bailee, or lost, the question of his responsibility depends upon the issue of ordinary care;⁶ and where it perishes from internal defect, inevitable accident, or superior force, the bailee is free from responsibility, unless he had specially agreed to

¹ See *Giblin v. McMullen*, L. R. 2 P. C. 317; *Foster v. Essex Bank*, 17 Mass. 500.

² *Supra*, p. 697.

³ See 1 Sch. Pers. Prop. 485, 486.

⁴ *Story Bailm.* §§ 429, 430; *Platt v. Hibbard*, 7 Cow. 497; *Foster v. Essex Bank*, 17 Mass. 500; *Morse v. Crawford*, 17 Vt. 499; *Chamberlain v. Cobb*, 32 Iowa, 161; *Batut v. Hartley*, L. R. 7 Q. B. 594; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Spangler v. Eicholtz*, 25 Ill. 297; *Halty v. Markel*, 44 Ill. 225; *McCarthy v. Wolfe*, 40 Mis. 520; *Eastman v. Patterson*, 38 Vt. 146.

⁵ See *Story Bailm.* §§ 421, 442, 451, 455, 457; *Wallace v. Parker*, 5 Cold. 476; *Foster v. Pettibone*, 7 N. Y. 433; *Newhall v. Paige*, 10 Gray, 366.

⁶ *Story Bailm.* § 430; *Platt v. Hibbard*, 7 Cow. 497; and other cases *supra*.

assume such risks.¹ But for injury directly resulting from the bailee's want of ordinary care the bailee is liable, notwithstanding an accident afterwards happens which must inevitably have ruined the chattel.² The question of ordinary care or negligence is doubtless one of proof; but it would appear that where goods are returned or delivered over damaged, or not at all, negligence is presumable, and the bailee should show due care on his part, the more so if the loss could not have ordinarily occurred without the bailee's negligence.³

To lay down a positive rule of liability for such cases, irrespective of the circumstances which may be presented, would mislead; for the line of the bailee's duty varies with the nature of the chattel and the precautions suitable for its preservation, and likewise with his means for fulfilling the purpose of the bailment as brought to the bailor's notice. One who intrusts his chattels to another, knowing how and where the bailee will keep them, is chargeable with such knowledge, and must estimate ordinary care accordingly, and not by any absolute standard;⁴ and, if the bailee takes goods on storage in a certain building of whose fitness the bailor was enabled to judge for himself, his liability for negligence shall not be extended because of some defect of construction imputable to the builder, and unknown to the bailee.⁵ Similar considerations apply to the skilfulness or unskilfulness of the bailee, — an important element in the bailment of hired service to be bestowed upon a chattel: for while it is the rule

¹ *Watkins v. Roberts*, 28 Ind. 167; *Story Bailm.* § 437.

² See *Powers v. Mitchell*, 3 Hill, 545; *Smith v. Meegan*, 22 Mis. 150; *Francis v. Castleman*, 4 Bibb, 282.

³ See *Cumins v. Wood*, 44 Ill. 416; *Fulton v. Alexander*, 21 Tex. 148; *Collins v. Bennett*, 46 N. Y. 490; *Goodfellow v. Meegan*, 32 Mis. 280.

⁴ See *Shaw, C. J.*, in *Whitney v. Lee*, 8 Met. 91; *Knowles v. Atlantic, &c. R. R. Co.*, 38 Me. 55; *Searle v. Laverick*, L. R. 9 Q. B. 122. In this last case the building was unfinished; but the bailee exercised ordinary care in employing the builder.

⁵ *Searle v. Laverick*, *supra*.

that the degree of ordinary skill and diligence is apportioned to the value of the thing and the delicacy of the undertaking, and that want of skill is imputable as gross negligence wherever a bailee's profession implies skill, no bailor can safely disregard the bailee's habits, character, and general reputation, as brought to his personal knowledge; and a man known to be unskilful, who is employed to do a work requiring skill, cannot be held for want of due skill if he did according to his ability.¹ In all bailments for doing something to a chattel, the bailee is liable for non-performance as well as for careless performance;² and damages are awarded, upon his default, under the ordinary rule of contracts.³

Should a party undertake to do something to a chattel for his own exclusive benefit, the bailment would be of the third class, compelling him to use extraordinary care and diligence, and to respond for acts of slight negligence; but a bailment strictly of this sort can seldom be found.⁴

As between the parties to the bailment for doing something to a chattel, there are further rights and duties growing out of the relation. If the bailment be of the first or second class, the bailor should reimburse the bailee's expenses incurred in the reasonable discharge of the trust, and save him from loss, and, in general, perform his part towards facilitating the business faithfully and prudently; further paying, in a mutual-benefit bailment, the agreed compensation, or, at all events, what is reasonable, and conforming to all special engagements he may have entered into.⁵ The bailee, on his

¹ *Beauchamp v. Powley*, 1 Moo. & Rob. 38; *Stanton v. Bell*, 2 Hawks, 145; *Story Bailm.* §§ 431-435; *Smith v. Meegan*, 22 Mis. 150.

² See *Story Bailm.* § 436.

³ *Trent, &c. Co. in re*, L. R. 4 Ch. 112; *supra*, pp. 545, 600.

⁴ *Wilson v. Brett*, 11 M. & W. 113; *Chamberlain v. Cobb*, 32 Iowa, 161. But as to borrowed chattels, see *infra*, c. 2.

⁵ See *Story Bailm.* § 425.

part, should exercise a corresponding good faith, never departing from the terms of the bailment, and, under a mutual-benefit bailment, perform the trust with due promptness, and as well as he can consistently with his undertaking, conforming to the contract as to his own engagements, nor charging more than what is reasonable, or the seller agreed to pay.¹ A bailee who departs from the terms of his bailment renders himself strictly liable for the injury he occasions the bailor.² As to third parties, a mutual-benefit bailee in possession may usually sue in his own name, and recover from strangers for their damage to the chattel, getting damages commensurate with the injury ; this by virtue of his special property in the chattel.³ It is a general principle, that a bailee cannot, under any pretence, dispute his bailor's title ; though, of course, he may, to a reasonable extent, protect himself from loss, when adverse claims of ownership are brought to his knowledge, and it is doubtful to whom he ought to make delivery.⁴

A bailment terminates, naturally, when its purpose is accomplished ; or sooner, when a party for due cause, or to terminate a gratuitous bailment, sees fit to end it. The bailor should, in general, make a demand upon his bailee before suing for the chattel, unless the latter's position has been already changed by his misappropriation, or positive refusal to perform his engagement ; and, upon such demand, the bailor

¹ Story Bailm. §§ 428, 440. As to the lien of bailees, see 1 Sch. Pers. Prop. 484-500.

² See *Martin v. Cuthbertson*, 64 N. C. 328 ; *Francis v. Castleman*, 4 Bibb, 282.

³ *Eaton v. Lynde*, 15 Mass. 242 ; *Morse v. Androscoggin, &c. R. R. Co.*, 39 Me. 285 ; *White v. Bascom*, 28 Vt. 268 ; *Bliss v. Schaub*, 48 Barb. 339 ; *Woodman v. Nottingham*, 49 N. H. 387 ; *Raynor v. Childs*, 2 F. & F. 775.

⁴ *Ball v. Liney*, 48 N. Y. 6 ; *Cook v. Holt*, 48 N. Y. 275 ; *Maxwell v. Houston*, 67 N. C. 305.

—not, however, in utter disregard of his rightful claims by lien or otherwise — must hand the chattel over.¹ For his secret conversion of the goods, the bailee remains liable as under a trust; and the Statute of Limitations does not begin to run from the date of such wrongful act, but rather from the time when the party to whom he is responsible found it out.²

¹ *Phelps v. Bostwick*, 22 Barb. 214; *Dunlap v. Hunting*, 2 Den. 643; *Felton v. Hales*, 67 N. C. 107; *Vaughan v. Webster*, 5 Harring. 256; *Duncan v. Magette*, 25 Tex. 245.

² *Wilkinson v. Verity*, L. R. 6 C. P. 206; *Darden v. Allen*, 1 Dev. 466. And see *post*, c. 2.

CHAPTER II.

BORROWED AND HIRED CHATTELS.

THE borrowing or hiring of a chattel is the bailment which most nearly approaches a transfer of title ; for the purpose of the transaction is to invest some new party with a sort of temporary ownership in the thing, and a limited beneficial enjoyment. Using words in this connection with more than the ordinary precision of meaning, we shall proceed, then, to speak of *borrowing* as the gratuitous bailment for the bailee's sole benefit, and *hiring* as the bailment for mutual benefit ; the bailor being, in the one case, a *lender*, and in the other a *letter* ; while the bailee is correspondingly a *borrower* or a *hirer* of the chattel.

But a difference between the civil and common law here confronts us : namely, that our doctrine of bailment contemplates a re-delivery of the thing itself at the expiration of the period of borrowing or hiring, while the Roman law specified a class of bailments as *mutuum*, where the bailee's obligation was to re-deliver, not the specific thing furnished him, but another, whether absolutely or as a matter of option, of the same kind and value. We recognize no mutual bailment in any sense : but the doctrine of England and America is, that, when the property in the identical thing delivered thus passes completely over to the new possessor, there is, in substance, a contract of sale, with its accompanying rights and risks of title, and the transaction is no bailment at all ;¹ the buyer, in

¹ Story Bailm. §§ 371, 415 ; Hurd v. West, 7 Cow. 752 ; *supra*, pp. 38, 39 ; Lonergan v. Stewart, 55 Ill. 45 ; Chase v. Washburn, 1 Ohio St. 244 ; McKay v. Hamblin, 40 Miss. 472.

other words, becomes simply a debtor to make the promised return. If, however, the identical thing was to be absolutely re-delivered, however altered in form, there is a bailment.¹ The test of such a distinction lies in the agreement of the parties, whether for a transfer of the original owner's absolute property or not; and, under any conditional delivery which withholds this full transfer until the condition is fulfilled, the new possessor, though bargaining as a buyer, occupies, meantime, the position of a bailee.²

The borrower or hirer of money, at our law, comes within reach of the same general principle. Binding himself to return, not the identical money received, but money to the same amount, he makes himself, not a bailee, but the purchaser of that money, to do with it as he will; or rather the debtor of the party from whom he received it. As a borrower, he, so to speak, has a like amount to pay back; as a hirer, he is to pay back the amount with interest: but one might buy a flock of sheep, or any other kind of chattel, under corresponding variations of contract.³ Any creditor may have security for the debt, by way of lien, pledge, or mortgage; and when the security is in his own possession, while he is not its complete owner, his posture is that of bailee with reference thereto.⁴

We proceed to consider (1st) the measure of care required; (2d) the general rights and liabilities of bailor and bailee; (3d) termination of the bailment in the case of a borrowed

¹ *Foster v. Pettibone*, 7 N. Y. 433; *King v. Humphreys*, 10 Penn. St. 217; *Barker v. Roberts*, 8 Me. 101.

² *Dunham v. Lee*, 24 Vt. 432; *Blyth v. Carpenter*, L. R. 2 Eq. 501; *Kent v. Buck*, 45 Vt. 18; *Hunt v. Wyman*, 100 Mass. 198; *Prichett v. Cook*, 62 Penn. St. 193; *Hurd v. West*, and other cases cited *supra*.

³ See *Bellows v. Denison*, 9 N. H. 293; *Kohler v. Hayes*, 41 Cal. 455; *Putnam v. Wyley*, 8 Johns. 432; *McKenney v. Haines*, 63 Me. 74; 1 Sch. Pers. Prop. 304, 459, *passim*; *supra*, pp. 281, 318.

⁴ As to debts secured by lien, pledge, or mortgage, see 1 Sch. Pers. Prop. 482, 507, 530, *passim*, where the subject is fully treated.

or hired chattel: premising that, since the *quid pro quo* of hire is not of necessity a money payment, our courts incline to construe the bailment of a chattel into one of hiring rather than borrowing, wherever some sort of consideration appears;¹ and that the lender or letter may be himself a qualified, not an absolute, proprietor.²

(1st.) As to the measure of care and diligence required, what has been observed of bailment in general applies in the present connection. The borrower of a chattel, being a gratuitous bailee, is bound to exercise extraordinary care, and must respond for even slight acts of negligence, whereby the lender suffers injury because of the loan;³ and if he deviates from the strict terms of the bailment, and loss or damage ensues, he can hardly escape liability in damages.⁴ But where the buyer pursues the line of his duty, an injury to the chattel which imputes to him no carelessness must be borne by the owner;⁵ and the character and habits of the bailee as brought to the bailor's knowledge, and the condition of the chattel when loaned, are, of course, material circumstances.⁶

With the hirer of a chattel the rule is otherwise. His responsibility is, like that of any other mutual-benefit bailee, for ordinary care and diligence; and for nothing less than ordinary negligence in using the chattel intrusted to him must he respond in damages, provided he does not depart from the terms of the bailment. Inevitable accident and superior

¹ See *Carpenter v. Branch*, 13 Vt. 161; *Chamberlain v. Cobb*, 32 Iowa, 16. If the transfer be for the joint use of borrower and lender, the bailment is no loan. Story Bailm. §§ 219-222.

² See Story Bailm. § 227.

³ Story Bailm. § 2; *Bennett v. O'Brien*, 37 Ill. 250; *Green v. Hollingsworth*, 5 Dana, 173; *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5.

⁴ *Kennedy v. Ashcraft*, 4 Bush, 530.

⁵ *Fortune v. Harris*, 6 Jones, 532; *Carpenter v. Branch*, 13 Vt. 161; *Wood v. McClure*, 7 Ind. 155.

⁶ *Ib.* See Story Bailm. §§ 237-254; *Blackmore v. Bristol, &c. R. R. Co.*, 8 E. & B. 1035.

force, causing injury or destruction, sufficiently excuse him from returning the chattel as it came to him ;¹ and so would its natural deterioration from causes which ordinary care would not have prevented.² Thus one who hires a horse ought to provide him with regular food, unless there was a special agreement to the contrary ; and, whether the horse be sick or well, he should act like any prudent man in loading, driving, supplying shelter, and healing diseases or bruises, taking the advice of a farrier or other expert if it be imprudent not to do so :³ for the hirer may be sued whenever bad usage on his part contributes essentially to killing or spoiling the animal ; while, on the other hand, he shall not suffer where loss occurred while he was exercising that care and diligence which the generality of mankind use under like circumstances.⁴

A person whom the letter plainly perceives to be unskilful, as a young child, cannot be presumed the proper hirer of a horse, a boat, or a dangerous weapon, so as to be held absolutely to the exercise of ordinary care and diligence ; but, in general, one who makes a business of letting, like a livery-stable keeper, may well accommodate his customer, so far as risking injury to the chattel alone is concerned, trusting to the hirer's pecuniary responsibility for fulfilling the ordinary engagements of bailee.⁵ A hirer may be further responsible

¹ Story Bailm. §§ 398-408; Vaughan v. Webster, 5 Harring. 256; Millon v. Salisbury, 13 Johns. 211; Jackson v. Robinson, 18 B. Mon. 1; Columbus v. Howard, 6 Geo. 213; Field v. Brackett, 56 Me. 121; cases *infra*; Watkins v. Roberts, 28 Ind. 167; Hyland v. Paul, 33 Barb. 241. In order to render such bailee liable for loss in cases like these, an express undertaking should be very strictly proved. Field v. Brackett and Hyland v. Paul, *ib.*

² *Ib.*

³ Handford v. Palmer, 3 B. & B. 359; Deane v. Keate, 3 Camp. 4; M'Neills v. Brooks, 1 Yerg. 73; Banfield v. Whipple, 10 Allen, 27; Graves v. Moses, 13 Minn. 335; Eastman v. Sanborn, 3 Allen, 594; Story Bailm. §§ 409, 412.

⁴ Watkins v. Roberts, 28 Ind. 167; Millon v. Salisbury, 13 Johns. 211; M'Evers v. Steamboat Sangamon, 22 Mis. 187.

⁵ See Mooers v. Larry, 15 Gray, 451.

for injury occasioned by his friend, employé, or other third party; and the latter, on the other hand, where the third party was in his own employ; the doctrine here applied being the familiar one of master and servant.¹

The rule concerning the burden of proof required to establish such negligence is not always clearly stated: but if it be shown that the chattel was returned in a damaged condition, or not at all, the bailee ought, in general, to explain so as to exculpate himself, or else bear the consequences; and a jury may weigh all the evidence thus submitted.²

(2d.) The general rights and liabilities of bailor and bailee should, here as elsewhere, comport with the character of the bailment, and the spirit of the mutual undertaking. Whether as borrower or hirer, the bailee must use the chattel confided to him as fairly intended, and restore it at the proper time in proper condition, — subject, of course, to the qualifications of care and diligence in its use and preservation already stated.³ The lender or letter, on his part, should allow his bailee the unobstructed use and beneficial enjoyment of the chattel to the full extent of the compact, making delivery in the first place, and doing nothing afterwards to diminish the bailee's peaceable possession, while the term of bailment properly continues: under some circumstances, he should even keep the chattel in repair; though in this and other respects the understanding of the parties, or a consistent local usage, constitutes the true groundwork of interpretation.⁴ It may be generally affirmed that a borrower's term of enjoyment is liable to be cut short at the lender's pleasure, and that

¹ *Woodward v. Cutter*, 33 Vt. 49; *Hughes v. Boyer*, 9 Watts, 556; *Sch. Dom. Rel.* 633-646; *Quarman v. Burnett*, 6 M. & W. 499; *Croft v. Alison*, 4 B. & A. 590; *Wheatley v. Patrick*, 2 M. & W. 650.

² See *Story Bailm.* §§ 278, 410, and *Bennett's n.*; *Logan v. Mathews*, 6 Penn. St. 417; *Cuminis v. Wood*, and other cases *supra*, p. 700.

³ *Story Bailm.* §§ 236, 254, 255, 394, 413.

⁴ *Story Bailm.* §§ 383-391; *Reading v. Menham*, 1 Moo. & Rob. 234.

meantime the former bears the expenses incidental to preserving the chattel; while the law seeks to guard the hirer's term more carefully against interruption from the bailor or his creditors, or adverse claimants, inasmuch as he is bound, on his part, to a recompense for the benefits conferred upon him.¹ Disturbance by a stranger gives the borrower no remedy against the lender; but for legal, though not tortious dispossession, a hirer may sue his letter, or recoup for damages, as for breach of title-warranty.²

The letter of a chattel is held to be responsible, in case the hirer is put to damage because of the chattel's decided unfitness for the purpose of the bailment; on the ground, as it would appear, that the hirer must trust to the seller's knowledge of the chattel's intrinsic qualities, like the purchaser under an implied warranty.³

On the other hand, the borrower or hirer is bound to reasonable methods of enjoying the use of the chattel in his possession. If he departs unreasonably from the terms of the bailment, he makes himself strictly liable for the consequences suffered, and may, in a gross case, even be summarily dispossessed by his bailor.⁴ The attempt to sell, pawn, or otherwise transfer the chattel without the owner's permission is a gross breach of fidelity: and, as a general rule, no sale by a bailee will avail even a *bona fide* purchaser for value as against the bailor or rightful owner, who may at once pursue the chattel as his own, and sue in trover for its repossession;⁵

¹ Story Bailm. §§ 256, 258, 395, 416; *Hartford v. Jackson*, 11 N. H. 145; *Hickok v. Buck*, 22 Vt. 149.

² Story Bailm. §§ 272, 372, 387.

³ *Jones v. Page*, 15 L. T. N. S. 619, Ex.; *Fowler v. Lock*, L. R. 7 C. P. 272.

⁴ See *Wentworth v. McDuffie*, 48 N. H. 402.

⁵ *Ib.*; *Shelley v. Ford*, 5 C. & P. 313; *Rodgers v. Grothe*, 58 Penn. St. 414; *Cooper v. Willomatt*, 1 C. B. 672; *Clarke v. Poozer*, 2 M'ull. 434; *Swift v. Moseley*, 10 Vt. 208; *Clark v. Jack*, 7 Watts, 375; Story Bailm. § 413. See *supra*, p. 21, as to the extent of this right. Even

though to a certain extent certain bailments may, expressly or by implication, give the bailee a right to underlet, or even assign, his interest.¹ The borrower or hirer cannot set up a title in himself or others to defeat the obligations which he assumed under the contract with his bailor;² and, if adverse claimants appear to claim the thing, he is only justified in making such delay, or taking such precautionary measures, as may be needful for his protection.³

As against strangers, the rights of hirer and borrower do not appear to be co-equal. A hirer in possession under an unexpired term may sue all third parties in his own name for damages suffered in respect of the chattel;⁴ and, unless he has done something inconsistent with the hire so as to justify the bailor in treating the bailment as ended at once, it would appear that the latter cannot interpose by suing the party himself.⁵ But the borrower's interest is too slight to permit of such deference to his rights; and if the lender may terminate the gratuitous loan at pleasure, so may he sue third parties in his own name for injuries of this character;⁶ while at the same time the bailee's own suit appears to be maintainable, unless the bailor interferes.⁷ And wherever the bailment has ended, or the bailor has an immediate right to terminate it, and re-

painting the hirer's arms upon the panels of a hired carriage, according to local custom, cannot be set up as a badge of fraud so as to prevent the letter from recovering. *Marner v. Bankes*, 16 W. R. 62 C. P.

¹ As to the assignable interest of one with a bailee's lien, see *Bailey v. Colby*, 34 N. H. 29. See also *Harrison v. Marshall*, 4 E. D. Smith (N. Y.), 271.

² *Simpson v. Wrenn*, 50 Ill. 222.

³ *Supra*, p. 702.

⁴ *Clarke v. Poozer*, 2 M'Mull. 434; *Bliss v. Schaub*, 48 Barb. 339; *Woodman v. Nottingham*, 49 N. H. 387; *Harrison v. Marshall*, 4 E. D. Smith (N. Y.), 271; *Swift v. Moseley*, 10 Vt. 208; *Rindge v. Colerain*, 11 Gray, 158; *supra*, p. 702.

⁵ *Ib.* But see *Mears v. London, &c. R. R. Co.*, 11 C. B. N. s. 850, as to *permanent injury*.

⁶ *Orser v. Storms*, 9 Cow. 687; *Nicolls v. Bastard*, 2 C. M. & R. 659.

⁷ *Nicolls v. Bastard*, *supra*.

sume his chattel, he may sue a stranger by virtue of such termination.¹

The obligation of a hirer to pay the hire or recompense follows the stipulations of the contract. The seller's right to recover hire-money would usually cover the term of enjoyment; but if the contract be meanwhile rescinded, as where the hirer returns the chattel, and the letter sells or lets it to another before the time runs out, the former bailee is absolved from recompense for the balance of the term.²

(3d.) Termination of the bailment under discussion may occur in various ways,—such as lapse of time, or the accomplishment of the purpose; the chattel's loss or destruction; operation of law, as in case the bailee becomes the full owner; and rescission of the contract, by mutual consent or because of some violation of the bailee's engagement:³ to which last head may be referred the bailee's wrongful attempt to sell the chattel intrusted to his keeping.⁴ A gratuitous bailment may be terminated at the bailor's pleasure; and a similar option is not uncommonly reserved where a chattel is hired; nor need the bailee's right be inferior in this respect.⁵ Otherwise the period of borrowing or hiring is definitely fixed in advance, so that neither party has a right to interrupt it, or else the law assumes a reasonable time.⁶ Where there is any uncertainty as to the limit of the bailment, the bailor who seeks to resume the chattel ought to make a demand;

¹ *Drake v. Redington*, 9 N. H. 243; *Hurd v. West*, 7 Cow. 752. And see *Halyard v. Dechelman*, 29 Mis. 459.

² See *Story Bailm.* § 416; *Wright v. Melville*, 3 C. & P. 542.

³ *Story Bailm.* §§ 277, 418-420; *Wright v. Melville*, 3 C. & P. 542; *Halyard v. Dechelman*, 29 Mis. 459; *Sargent v. Gile*, 8 N. H. 325; *Crump v. Mitchell*, 34 Miss. 449; *supra*, p. 702.

⁴ *Cooper v. Willomatt*, 1 C. B. 672; *supra*, p. 709.

⁵ See *Orser v. Storms*, 9 Cow. 687; *Drake v. Redington*, 9 N. H. 243; *Story Bailm.* § 258.

⁶ *Green v. Hollingsworth*, 5 Dana, 173.

but it is otherwise where no such uncertainty exists, or the demand would be nugatory.¹ Upon the rightful termination of the bailment from any cause, it is incumbent upon the bailee to make prompt restitution of the chattel, save so far as special circumstances of loss or injury may exempt him from liability, and render whatever compensation may be due; and any mutual adjustment of liabilities between the parties which remains should be upon the usual principle of dissolved relations under a contract.²

¹ See *Halyard v. Dechelman*, 29 Mis. 459; *Bailey v. Colby*, 34 N. H. 29; *Morse v. Crawford*, 17 Vt. 499; *Vaughan v. Webster*, 5 Harring. 256; *Ross v. Clark*, 27 Mis. 549; *Clapp v. Nelson*, 12 Tex. 370.

² *Hurd v. West*, 7 Cow. 752; *Negus v. Simpson*, 99 Mass. 388. Story Bailm. §§ 257, 268, 418-420.

I N D E X.

A.

	PAGE
ABANDONED PROPERTY. (<i>See ORIGINAL ACQUISITION.</i>)	
ACCEPTANCE,	
by donee under a gift <i>inter vivos</i>	85
by donee under a gift <i>causa mortis</i>	172
(<i>See GIFTS.</i>)	
of proposals to constitute a bargain	213
upon part delivery by seller, how inferable	217, 306
in sales "on trial," or "approval;" "sale or return"	308
where option is given to buyer	315
as a waiver of warranty	333
in sales, buyer's duty	417
(<i>See SALES.</i>)	
of part under Statute of Frauds	484
(<i>See FRAUDS, STATUTE OF.</i>)	
ACCESSION. (<i>See ORIGINAL ACQUISITION.</i>)	31
ACQUISITION. (<i>See ORIGINAL ACQUISITION.</i>)	
AGENCY,	
gift <i>inter vivos</i> through an agent	69, 80, 87
to an agent	71, 86
gift <i>causa mortis</i> through an agent	164, 167, 173
to an agent	171, 173
to superintend a chattel's manufacture	261
for custody under rule of conditional transfer	294
case of "sale or return;" <i>del credere</i> agent	314
agent's construction of condition in doubt	318
broker's rights, &c., as to condition or warranty	318, 324, 330
agent's authority to warrant what he sells	329
payment by or through agent; reimbursement of expense, 437, 440, 441	
under Statute of Frauds	496, 501, 532
damages for sale agent's conduct	549
fraud and illegality in agent's sale	635, 647
(<i>See AUCTION; BAILMENT.</i>)	

ASSIGNMENT,

- under gifts *inter vivos* 72
- under gifts *causa mortis* 157, 159, 164

(See GIFTS.)

- its leading principles as affecting title* 673
- what may be assigned; legal and equitable rules 673
- formalities considered 676
- notice to debtor; rights of subsequent parties as to notice . 678, 680
- construction of assignment; what it carries; consideration in-
quired into 680
- assignee's position under an assignment 682
- his rights with reference to his assignor 682
- his rights with reference to the debtor 683
- whether assignee has final recourse against assignor 685

AUCTION,

- sales at, included under Statute of Frauds 463
- where successive lots are sold, rule as to entirety 465, 483
- public or auction sales in general* 189, 655
- auctioneer, his rights and duties 656
 - how far an agent 656
 - personal responsibility, compensation, lien, &c. . 488, 658
- preliminaries of auction sale 660
- terms and conditions, advertisement, &c. 660
- method of conducting sale 663
 - of taking bids, closing upon highest bid 663
 - of memorandum and part payment under Statute of
Frauds 463, 537, 663
 - of auctioneer's warranty; license to enter premises . 330, 664
- fraud in the biddings; general principles 665
 - on the part of bidders; stifling competition 665
 - on the part of seller or auctioneer; puffing, &c. . . 666, 668
 - in limiting bids; sales with or without reserve 668
 - mistake as to terms 624
- enforcement of the auction contract 669
- settlement with purchaser; deposit-money, &c. 669, 670
- risks of title after the sale 670
- remedies upon buyer's default, &c. 670
- buyer's duty; auctioneer's adjustment with seller 671

B.

BAILMENT,

- of things without a known owner 26
- as to the increase of animals, and income of capital 30
- doctrines of accession and confusion applied 38, 42
- under a gift *inter vivos* 69, 71, 80, 86, 97
- under a gift *causa mortis* 164, 171, 173
- seller like bailee as to undelivered chattel 415

BAILMENT — *continued.*

warranty of title in bailee's sale	383
under Statute of Frauds	501, 502
as to lien remedies	561, 571
mistake as to loan, sale, or gift	621
rule of assignment applied	682
<i>in general</i>	695
distinguished from full title; general definitions	695
recompense or no recompense the usual test	696
degrees of care, diligence, skill, &c.	697
where bailment is for bailor's sole benefit	697
mutual benefit of bailor and bailee	699
bailee's exclusive benefit	701
further rights and duties growing out of the relation	701
as between bailor and bailee	701
as concerns third parties	702
how a bailment is terminated	702
demand by bailor; effect of bailee's conversion, &c.	703
<i>borrowed and hired chattels</i>	704
doctrine of borrowing and hiring in general	704
Roman mutual bailment not recognized at our law	704
English and American doctrine as to restoration in kind	704
rule as to borrower or hirer of money; loans upon security	705
classification of the present subject	705
measure of care required as to a borrowed or hired chattel	706
where the chattel is borrowed	706
where the chattel is hired	707
responsibility of letter or hirer for a third party's acts	707
general rights and liabilities of parties to such bailment	708
as between lender or letter, and borrower or hirer	708
as regards strangers	710
the payment of hire-money or recompense	711
termination of such bailment	711
borrowed and hired chattels here distinguished	711
bailor's demand; restitution; mutual adjustment by parties	712
BARGAIN. (<i>See SALES.</i>)	190
BARTER,	
law of	187, 291, 642
(<i>See EXCHANGE; SALES.</i>)	
BILL OF LADING. (<i>See DELIVERY.</i>)	270, 409
BILL OF SALE. (<i>See SALES.</i>)	414, 642
BUYER'S REMEDIES,	
instances in which the buyer may invoke remedies	600
<i>where the seller fails altogether to deliver</i>	600
personal action; rule of damages; instalment contracts	600, 603
when demand is necessary	604
specific performance; the choice of remedies	605

BUYER'S REMEDIES — *continued.*

rule as to suing in trover	605
<i>where there is delivery of unsuitable goods</i>	606
confusion of rules; buyer's right of rejection	606
limit of right to reject; its legal effect	609
buyer's right to keep goods and claim damages	610
requirement of notice; matters of practice	611
damages for breach as to quality	615
under instalment contract; waiver of breach	617
rule for breach of warranty of title	618
<i>where delivery is unreasonably late</i>	618
buyer's option of remedies in such case	618

(See RESCISSION OF SALE.)

C.

CARRIER. (See AGENCY; BAILMENT; DELIVERY.)

CONDITIONS,

under a gift	114
(See GIFTS.)	
precedent to transfer	273
<i>under general law of contracts</i>	273
mutual intent; stipulations dependent and independent	274
precedence of conditions; parties must perform in turn	276
exceptions of waiver and impossibility	277
<i>under the law of sales</i>	281
precedent or concurrent; parties must perform in turn	281
where a third party must first perform	281
exceptions of waiver and impossibility	282
as to time of performance	287
sales upon notice; rule of notice	288
<i>where property transfer is conditioned upon paying or securing price,</i>	290
obligation to deliver and obligation to pay are precedent or con-	
current	291
no title in buyer until cash is paid	292
until price is adjusted	294
delivery so given debars buyer's creditors	296
rule as concerns buyer's sub-purchasers	297
exceptions growing out of waiver or impossibility	301
evidence in sales for cash, &c., on delivery	305
rule as to partial delivery or partial payment	306
property may pass defeasible by condition subsequent	308
<i>sales "on trial" or "on approval;" bargain of "sale or re-</i>	
<i>turn"</i>	218, 308
conditional character of such sales	309
sales with option given to buyer	315
sales "to arrive," &c.	315

CONDITIONS — *continued.*

miscellaneous conditions; rule of construction	318
"condition precedent" distinguished from "warranty"	319, 359
sale by sample; its implied condition	319, 321
sale by description, its implied condition	319, 359
sale of incorporeal securities; condition of genuineness	322
sale of specific corporeal chattel, how far conditional	324
of sale transfer under Statute of Frauds	492
(See AUCTION; BUYER'S REMEDIES; WARRANTY.)	

D.

DELIVERY,

in gifts <i>inter vivos</i>	70
in gifts <i>causa mortis</i>	152
(See GIFTS.)	
in sales, effect of part delivery	217, 306
as determining the question of property transfer and mutual assent	240, 256
effect of delayed delivery	255
time as a condition	287
(See CONDITIONS.)	
rule of delivery by a carrier, &c.	268, 411-415
how affected by seller's reservation of <i>jus disponendi</i>	268
bill of lading reserving property to seller	268
where bill of lading is accompanied by bill of exchange	270
in sales "on trial" or approval; "sale or return"	308
where option is given to buyer	315
general principles under law of sales	396
(See SALES.)	
of part under the Statute of Frauds	484
DERELICT. (See ORIGINAL ACQUISITION.)	8
DOCUMENTS OF TITLE. (See SELLER'S REMEDIES.)	583 n., 597

E.

ERROR. (See RESCISSION OF SALE.)

ESTOPPEL,

in law of sales	410, 564-571
(See SELLER'S REMEDIES.)	

ESTRAYS. (See ORIGINAL ACQUISITION.) 18

EXCHANGE,

rule of conditions; "cross-sales"	291
fraud as affecting the transaction	642
Roman mutual bailment considered	704

F.

FRAUD,

under ordinary gift upon donor or donee	64, 97
upon creditors, purchasers, &c.	101
under gift <i>causa mortis</i>	130, 179, 180
in sale as to essentials	201, 628
upon seller's creditors, where he keeps possession	265, 266, 411
delivery conditional upon price payment no fraud	296
in auction sales	665

(See RESCISSION OF SALE.)

FRAUDS, STATUTE OF,

<i>Statute of Frauds in general</i> ; its history, &c.; language of 17th section	443
its policy in partial restriction; writing only <i>sub modo</i> essential	445
legal consequences of a non-compliance	445
conflicting theories stated; contract properly exists, but is not enforceable	448
how such contract becomes good by subsequent acts	448
statute compliance after goods have ceased to exist	449
conflict of laws; note given in consideration of damages, &c.	450
<i>section 17 of the statute, its leading divisions</i>	451
<i>what contracts are embraced</i>	451
“contracts for the sale of;” as to executory contracts, &c.	452
English and American decisions stated; Lord Tenterden's Act	452, 455, 458
summary of doctrines as to the contracts embraced	461
auction sales included; as to mortgages, loans, and miscellaneous contracts	463
entirety of a contract; sale of lots or parcels	464
“goods, wares, and merchandises;” personal property only included	467
unsevered crops considered; 4th and 17th sections compared	467
<i>fructus industriales</i> and <i>fructus naturales</i> ; general summary	467-475
as to contracts for the sale of fixtures	476
whether section 17 applies to incorporeal chattels	476
“price” or “value;” the standard prescribed	479
determination of such standard; principle of entirety in contracts	480
excessive price vitiates other stipulations in entire contract	483
<i>oral compliance under section 17</i>	484
<i>oral compliance by buyer's part acceptance and actual receipt</i>	484
legislative rule; as to seller; delivery	484
buyer's acceptance and actual receipt distinguished	486
entirety rule applied; time of performance, tests, &c.	487
acceptance and receipt by one of joint-purchasers	489
as to transfer of seller's property right; sales on condition, &c.	489, 492

FRAUDS, STATUTE OF — *continued.*

effect of part acceptance and receipt, &c.	493
buyer's part acceptance, in general; proof of intention; right to inspect, &c.	494
carrier or other agent to receive may not be agent to accept . . .	496
acceptance how evinced; mainly a question of fact	497, 500
actual part receipt in general	500
where goods are in buyer's custody	501
in third person's custody	502
in seller's custody	504
constructive delivery and receipt; transit, &c.	506
oral compliance by giving earnest or part payment	507
general doctrine; property right not necessarily transferred .	508, 510
where both discharge of debt and payment of price are contemplated	510
<i>written compliance by signed note or memorandum</i>	512
subscription need not be by enforcing party; as to written contracts	512
rules of evidence apply; classification of subject	513
as to the written note or memorandum	514
letter, acknowledgment, telegram, two or more writings . . .	514
writings and parol evidence, how far consistent	516, 518
to whom memorandum is addressed; writings not contemporaneous	517
as to what such writing should contain	519
identity of parties as buyer and seller to appear	519
subject-matter and essential terms should be shown	521
"price" distinct from "consideration;" other essentials . . .	522
substance, and not form, regarded; competency of evidence . .	523
writing which repudiates as a memorandum	524
where the original bargain has been modified	527
as to how and by whom the writing should be signed	529
method of signing; writing, printing, stamping, &c.	529
signature on one of several papers; by party to be charged . .	531
as to compliance by means of agents	532
authority how conferred; whether seller's agent may bind buyer .	533
evidence requisite; telegraph clerks, &c.	535
agent cannot be the other party himself	536
auctioneer's authority to make binding memorandum	537, 663, 664
broker's authority to make memorandum	539, 542
"bought and sold notes," and their efficacy	540 and n.
<i>sales sometimes affected by 4th section of statute</i>	542, 664

G.

GIFTS,

I. GIFTS IN GENERAL	55
definition; origin of such transfers	55

GIFTS — *continued.*

absence of consideration as an element	57
are a species of contract or mutual undertaking	59
mental capacity of donor and donee considered	62
freedom of will and good faith on both sides requisite	64
should be certain, and to a certain party	66
classification; gifts <i>inter vivos</i> and gifts <i>causa mortis</i>	66
II. GIFTS INTER VIVOS	68
definition and essentials	68
whether promise to give is enforceable	68
such promises to be distinguished from contracts upon considera- tion	70
<i>gifts inter vivos; how executed</i>	70
delivery with suitable intention requisite on donor's part	70
delivery, actual or constructive; according to subject-matter	70
words of gift alone do not suffice	70
<i>corporeal chattels</i> pass by manual delivery	71
rule where donee is custodian	71
whether delivery of receptacle carries its contents	72
<i>incorporeal chattels</i> , how delivered	72
where delivery is fully such as the species admits of	73
imperfect delivery supported as an equitable assignment	75
bonds, negotiable instruments, shares of stock, &c.	73, 76
savings-bank books	76
imperfect delivery supported as declaration of trust	78
equitable assignment and declaration of trust doctrines compared,	80
<i>delivery</i> to donee through some third party	80
where such third party takes as trustee for donee	81
where custodian of chattel is to deliver to donee	81
revocation of custodian's authority; death of donor pending delivery	82
delivery by instrument in writing	83
deed of gift, and its effect	83
other instruments in writing, and their effect	84
<i>acceptance</i> the requisite act on the donee's part	85
acceptance of a beneficial gift, how far presumable	85
act of donee should correspond to donor's act	86
other acts of donee; proceedings to perfect title, choice, &c.	87
<i>proof needed</i> to establish an executed gift	87
actual intention to be gathered from words, acts, and mutual con- duct	88
circumstances favorable to sustaining transfer as a gift	88
circumstances unfavorable to sustaining transfer as a gift	89
where a deed of gift is made	90
evidence of gift by forgiveness of a debt	90
one's mental reservation cannot defeat his gift	92
<i>summary</i> as to executing gifts <i>inter vivos</i>	92

GIFTS — *continued.*

<i>gifts inter vivos; effect of execution</i>	94, 114
<i>its effect as concerns the parties themselves</i>	94
<i>cannot be revoked or annulled by either party.</i>	94
<i>how far upheld upon the donor's death</i>	96
<i>a voidance for mental incapacity or fraud</i>	97
<i>where parties make new contract as to the gift</i>	97
<i>whether parental gifts may be revoked</i>	98
<i>civil law of revocation</i>	99
<i>its effect as concerns third persons</i>	99
<i>exceptions stated as to bona fide purchasers, &c.</i>	100
<i>the main exception concerns prejudiced creditors of donor.</i>	101
<i>fraudulent transfers affected by stat. 13 Eliz. c. 5, and analogous legislation</i>	102
<i>fraud a question of fact; intent to hinder, delay, and defraud</i>	106
<i>fraud upon donor's antecedent creditors</i>	107
<i>fraud upon donor's subsequent creditors</i>	109
<i>rule where donor has died insolvent</i>	112
<i>concluding remarks upon fraudulent transfer</i>	113
<i>qualified or conditional gifts inter vivos</i>	114
<i>successive interests in expectancy</i>	115
<i>alternative gifts; reservations to donor, &c.</i>	116
<i>reservation to donor cannot exclude creditors</i>	120
<i>construction of qualified gifts</i>	121
III. GIFTS CAUSA MORTIS:	
<i>nature of such gifts; their definition</i>	122
<i>their history; distinguished from ordinary gifts and legacies</i>	123
<i>capacity of parties to the gift</i>	129
<i>as to testamentary or contract capacity</i>	129
<i>undue influence; marital and parental relations</i>	130
<i>what property may be given causa mortis</i>	132
<i>as to gifts of one's whole property; civil and common law</i>	132
<i>such gifts confined to personal property</i>	136
<i>incorporeal species may be given causa mortis</i>	136
<i>but not donor's own note, bill, &c.</i>	138
<i>unless bill, draft, &c., is accepted by drawee</i>	142
<i>expectation of death</i>	143
<i>civil and common law doctrines discussed</i>	143
<i>"last illness," "peril of death," "expectation of death," &c.</i>	144
<i>conclusion from modern authorities</i>	150
<i>how gifts causa mortis are executed</i>	152
<i>execution on donor's part requires delivery.</i>	152
<i>mere promise to give is ineffectual</i>	153, 156
<i>of corporeal chattels, donor's delivery</i>	153
<i>symbolical delivery; receptacle and its contents</i>	154
<i>intention and the act must co-exist</i>	156
<i>of incorporeal chattels, donor's delivery</i>	156

GIFTS — *continued.*

modern quite different from ancient rule	156
gift of bonds and mortgages	157
gift of bills, notes, and other negotiable instruments	158
gift of insurance policy	159
gift of stock	160
gift of savings-bank deposit	161
gift of due-bill, receipt, &c. ; of receptacle and contents	163
<i>to third person</i> for donee, donor's delivery	165
promise of delivery by residuary legatee	167
<i>by instrument</i> in writing, donor's delivery	168
<i>whether formal delivery</i> can be dispensed with	170
case where donee is already in possession	170
how far chancery aids informal delivery	172
<i>execution on donee's part</i> , what is requisite	172
<i>proof</i> of execution to establish such gifts	173
burden on donee ; donor's declarations, &c.	174
how issue is determined in practice	175
evidence of such gift by forgiveness of debt	175
<i>effect of executing gift</i> as concerns the parties themselves	176
revocation by donor's recovery from peril	176
by donee's death before donor	177
by donor who repents the gift	177
whether posthumous birth causes revocation	178
revocation for mental incapacity or fraud	179
controversies between donee and donor's representatives	179
<i>effect of executing gift</i> as to third parties	180
claims of creditors not to be defeated ; practice	180
<i>qualified or conditional gifts causa mortis</i>	181
<i>general policy</i> of gifts <i>causa mortis</i>	182
<i>mistake</i> as to loan, sale, or gift	621

I.

ILLEGALITY,

in sales	189, 643
--------------------	----------

(See RESCISSION OF SALE.)

INDORSEMENT,

in making a gift <i>inter vivos</i>	73, 74
in making a gift <i>causa mortis</i>	158

(See GIFTS.)

its leading principles as affecting title	672
---	-----

J.

JUS DISPONENDI,

reservation of, by seller	249, 256, 267
-------------------------------------	---------------

(See SALES.)

L.

LEGATEE,

gift *causa mortis* through 167

LIEN,

in general under law of sales 397, 435, 439, 558, 579

(See SELLER'S REMEDIES.)

in conditional acceptance under Statute of Frauds 492

LIMITATIONS,

prescription in general; our statutes of limitations 686

purpose of such legislation to afford repose 687

period as to various classes of personal property 688

disabilities which prevent the statute from operating 689

government an exception to the rule, but not municipal corporations 690

how the period may be broken by debtor; part payment or new promise, &c. 691

effect of limitations; lapse of the period 692

where a new act is passed, &c. 692

the remedy and the right; pleading; rule as to new promise . . . 693

rule as to conversion under a bailment 703

LOST CHATTELS. (See BAILMENT; ORIGINAL ACQUISITION.) 14, 21, 24

M.

MARKET-OVERT. (See ORIGINAL ACQUISITION.) 21

MEMORANDUM. (See FRAUDS, STATUTE OF.) 512

MENTAL CAPACITY,

requisite in gifts generally 64, 97

rule in gifts *causa mortis* 129

MISTAKE. (See RESCISSION OF SALE.)

O.

OCCUPANCY. (See ORIGINAL ACQUISITION.)

ORIGINAL ACQUISITION,

includes occupancy, and title to products 8

occupancy in the primitive sense; foundation of title 6

occupancy in the modern sense 5

chattels intentionally abandoned or derelict 8, 9

waifs; to whom they belong 9

treasure-trove and its ownership 9, 10

wrecks, ancient and modern doctrines as to title 10-13

lost chattels, and to whom they belong 14-17

rule as to lost negotiable instruments 17, 18

estrays and wild animals, their ownership 18-20

stolen chattels, original owner's title 20

ORIGINAL ACQUISITION — *continued.*

<i>bona fide</i> buyer's title to lost or stolen chattels	21
where chattel was sold in market-overt	21
where chattel is of a negotiable character	23
when a finder may be treated as a thief	24
miscellaneous instances of chattels without a known owner	25
summary of the modern doctrine of occupancy	26
<i>title to products in general</i>	29
title to general products; brain products; patents and copyrights, increase of animals; income of capital	30
<i>accession considered as a rule of title</i>	31
definition of accession; its elements	31
old distinction as to creating some new species or not	34
qualification of rule by considering comparative values	35
as to taker's wilful or unintentional trespass	35
doctrine summed up as to chattel accession without mutual assent, accession of chattels by agreement of parties	37
accession of one person's chattels to another's real estate, intentional or unintentional	39
<i>confusion considered as a rule of title</i>	40
defined and distinguished from accession	41
by mutual consent, its effect	42
by one's wilful misconduct, its effect	45
by one's unintentional mistake of fact	47
because of inevitable accident or <i>vis major</i>	50
Roman law of confusion	52
points of similarity and of difference between accession and confusion	53

OWNERSHIP. (*See* TITLE.) ¶ -

P.

PAYMENT,

presumptions as between cash and credit sales	228
by instalments as a chattel is made	261
where transfer of title is conditioned upon payment	290-308
(<i>See</i> CONDITIONS.)	
partial payment and partial delivery	306
in sales, buyer's duty discussed	424
(<i>See</i> SALES.)	

PERSONAL PROPERTY,

summary of doctrines in the preceding volume	1
(<i>See</i> TITLE.)	

PRICE. (*See* SALES.) 188, 195, 282

PRODUCTS. (*See* ORIGINAL ACQUISITION.)

R.

REAL PROPERTY. (*See* TITLE.)

RESCISSION OF SALE,

I. ERROR OR MISTAKE:

should be substantial, &c.; instances cited . . .	202, 204, 620, 623
as to quality, &c., not substantial	622
as to the party dealt with	622
rule of construction; mutual and one-sided mistakes	624
effect upon sales executed or not executed	626
restitution required; entire contracts, &c.	627
duty of one who receives goods by mistake.	628

II. FRAUD:

in sale contracts generally	628
<i>of the seller on the buyer</i>	629
<i>caveat emptor</i> does not countenance fraud	629, 638
buyer must have been deceived; his duties	632
may sue upon the fraud or for breach of warranty	633
<i>scienter</i> to be here shown; rule of damages	634
rule where fraud is by seller's agent	635
<i>of the buyer on the seller.</i>	636
how inferred; rule as to sub-buyers, &c.	637
where buyer is an impostor	638
where buyer conceals important information	639
where one induces sale to another; Lord Tenterden's Act . . .	640
seller's election of remedies; matters of practice	641
in a case of exchange	642
extortion of a bill of sale	642
<i>of both buyer and seller upon some third party.</i>	642
general doctrine; bearing of legislation	642

III. ILLEGALITY:

general rule of avoidance, with its qualifications	643
where some promises are illegal, and others legal	645
greater strictness in case of palpable moral offence	646
principal cannot profit by agent's illegal contract	647
as to sales illegal at common law	647
sales against public policy; sale of offices, &c.	648, 649
sale of law-suits; restraint of trade, &c.	650
as to sales made illegal by legislation	651
sales against revenue acts, liquor acts, Sunday laws, &c. .	651, 652

IV. MUTUAL RESCISSION:

parties may rescind at pleasure, &c.	653
--	-----

REVOCATION,

of gift <i>inter vivos</i>	94, 97, 99
of gift <i>causa mortis</i>	176, 180

(See GIFTS.)

S.

SALES,

I. SALES IN GENERAL:

<i>preliminary observations; definitions</i>	185, 186
barter or exchange	187
classified; absolute or qualified, executed or executory, of things	
specific or not specific, legal or illegal, private or public	188
involuntary or judicial sales	189
the parties, — seller, buyer, agents, &c.	190
corporeal or incorporeal chattels, how sold	190
<i>the leading essentials of a sale</i>	190
a thing to be sold, essential	191
as to chattels no longer existing	191
as to chattels not yet existing	192
a price essential	188, 195
as to payment in commodities instead of money	195
price should be fixed or ascertainable	197
sometimes left to third party's adjustment	199
where implied instead of expressed	200
should be <i>bona fide</i> ; need not be adequate	201
mutual assent to transfer of the thing at the price	202
mutuality as to the thing	202
mutuality as to the price	204
mutual assent in general, how expressed	204
negotiation of bargain, proposals, &c.	205
how carried on; concluded by letters or telegrams	205
common and civil law doctrines compared	211
limitations as to place and time of accepting proposal	213
where proposer leaves time open for assent	213
how assent may be inferred	217
sales may be conditional or qualified	218
writings constituting a bargain construed	218

II. TRANSFER OF PROPERTY RIGHT:

transfer of property right in a sale; mutual assent	221
executory and executed sale contracts; civil and common law	222
<i>property transfer in sale of specific chattels; specific chattels de-</i> <i>fin</i>	224
where nothing remains to be done to chattel	227
transfer of property presumed when bargain is closed	227
shifting of this presumption; rule qualified	228
where something remains to be done to chattel	231
doctrines of Judge Blackburn; putting into a deliverable condi-	
tion, weighing, measuring, &c.	231-242
property right one element of title, &c.	243 n.
<i>property transfer in sale of chattels not specific</i>	244

SALES — continued.

goods must be separated, selected, &c., and subject-matter made specific	244
but numerous exceptions are found; mutual intent regarded	245
instances where an article is made to order	247
doctrine of subsequent appropriation; cases reviewed	250, 258
more than appropriation may be needful	254
delivery as a circumstance in appropriation	256
application where chattels are made to order	258, 264
rule as to unfinished chattels, ship-building, &c.	261
property transfer for limited purposes; rule as to creditors	265
<i>seller's reservation of <i>jus disponendi</i></i>	267
application to carrier's delivery.	268
bill of lading; its effect restrained	268
where accompanied by bill of exchange	270
limitations of the <i>jus disponendi</i> doctrine	271
conditions in sales	273
sales "on trial," "subject to inspection," &c.	282
(See CONDITIONS.)	
warranty, express and implied, in sales	326
(See WARRANTY.)	
III. TRANSFER OF POSSESSION, &c.	396
<i>delivery in general</i> ; numerous meanings of the word	396
seller's general duty of delivery in fulfilling bargain	398
general rule as to place of delivery; mutual intent qualifies	399
time of delivery; sundry expressions; month, day, hour, &c.	401
quantity to be delivered; no more nor less than contracted for	404
construction as to quantity; substantial not literal compliance	407
rule of partial delivery	408
as to manner of delivery; general principles	408
<i>indicia</i> of title; constructive delivery	409
miscellaneous points as to delivery	411, 414
seller's limit of responsibility as to transit, &c.	411
rule as to warehousemen and other agents	411, 413
where thing sold is in buyer's possession; bill of sale, &c.	414
seller's responsibility as to chattel sold, but not delivered	415
seller's duty measured by scope of contract	415
<i>buyer's leading obligations</i>	417, 424, 441
<i>buyer's duty of acceptance</i>	417
acceptance in general; more than receipt	417
buyer's right to inspect before accepting	419
acceptance inferred from delay, acts of ownership, &c.	420
duty of rejecting and returning goods, if unsatisfactory	422
seller's waiver of strict legal requirements in such cases	424
where delivery is for acceptance by instalments	424
<i>buyer's duty of payment</i>	424
several modes of payment stated	424

SALES — *continued.*

payment of price in cash; ordinary rule	425
time and manner of payment; paying by instalments	425
rules as to cash payment applied	427
tender of cash; what suffices; doctrine stated	428
payment by present adjustment not in cash	432
buyer's note, acceptance, &c., whether absolute or conditional payment	432
case of further security, third party's obligation, commodity, &c.	434
effect of such third party's insolvency before delivery	435
where adjustment is partly cash and partly credit, &c.	436
as to sales on credit; general principles	436
payment through buyer's or seller's agents	437
how made to seller's agent; agent's authority to adjust	438, 440
lien of certain agents not discharged by payment to principal	438
as to settling with broker, &c., who sells for principals	440
Roman law of payment and tender	441
miscellaneous costs, expenses, &c., in sales, &c.	441
law of sales affected by important legislation	443
(See FRAUDS, STATUTE OF.)	
remedies for breach under the law of sales	544, 556, 579, 600
(See BUYER'S REMEDIES; SELLER'S REMEDIES.)	
avoidance of sale for error, fraud, or illegality; mutual rescission	620
(See RESCISSION OF SALE.)	
public or auction sales	189, 654
(See AUCTION.)	

IV. MISCELLANEOUS:

lost or stolen chattel, sold in market-overt	21, 23
doctrines of accession and confusion applied	38, 42
restoration in kind constitutes a sale, not a bailment	704

SAMPLE,

sale by, what constitutes	319, 330, 346, 369-378
buyer's right to examine under such sale	419, 422
acceptance under Statute of Frauds	488, 496
(See CONDITIONS; WARRANTY.)	

SELLER'S REMEDIES,

<i>in general, for buyer's breach</i>	544
<i>by personal action where property has not passed</i>	544
damages awarded; rule of measurement	545
items thus reckoned; duty of re-sale	545, 546
as to reckoning an agent's torts, &c.	549
market value; exceptions to rule of measurement	549
choice of remedies given in New York practice	551
rule under part delivery; as to liquidated damages	552
<i>by personal action where property has passed</i>	553
seller sues as creditor, if possession be surrendered	553
but rights under security remain; conditional surrender	554

SELLER'S REMEDIES — *continued.*

form of action for goods sold and delivered	554
where property has passed, but not possession	555
<i>by proceedings against the goods</i>	555, 556
<i>re-sale, lien and stoppage in transitu</i> to be considered	556
unpaid seller's rights in goods after property has passed	557
nature of his lien right while he holds possession	557
as between unpaid seller and insolvent buyer himself	559, 562
custody of seller or his agent; advances to buyer	560, 561
as between unpaid seller and buyer's sub-vendee	563, 565
seller may by his conduct be estopped from asserting lien	564
doctrine of estoppel; bailee in possession estopped	566, 571
<i>law of re-sale</i> ; general doctrine	571
where property has passed, but not possession, English rule, 572, 576 <i>n.</i>	
American doctrine of re-sale	577
requirement of notice; replevin suits	578
<i>seller's lien; its nature and extent</i>	557, 579
how such lien may have been excluded or waived	580
up to what period the lien extends	581
effect of transferring documents of title	582, 583 <i>n.</i>
how buyer by tender, &c., may terminate seller's lien	584
<i>seller's right of stoppage in transitu</i>	579, 586
parties by and against whom the right is exercised	587
seller, consignor, &c., but not a stranger, may exercise it	587
party against whom, is buyer or <i>quasi</i> buyer	588, 589
the transit with its proper limits	590
carrier for transit; continuous purpose of transportation	591
buyer may break transit, and intercept his goods	592
carrier's acts at terminus; what acts exclude seller	592
method of exercising right of stoppage; notification to middle-	
man, &c.	595
effect of exercising right; parties stand as before	596
seller's right paramount to that of buyer's attaching creditors	597
right how defeated by transfer of documents of title	597
must be <i>bona fide</i> transfer to third party for value	598

(See BUYER'S REMEDIES; RESCISSION OF SALE.)

STATUTE,

of 13 Eliz. c. 5, &c., as to gift in fraud of creditors, &c.	102
(See GIFTS.)	
as to sale in fraud of creditors.	642
of frauds	443
(See FRAUDS, STATUTE OF.)	
of limitations	686

(See LIMITATIONS.)

STOLEN CHATTELS. (See BAILMENT; ORIGINAL ACQUISITION.) 9, 20

STOPPAGE IN TRANSITU. (See SELLER'S REMEDIES.) 398, 579, 586

T.

TITLE,

- to personal property in general 2, 3
- its essentials 2, 3, 243 n.
- how it may accrue; original and derivative acquisition 4
(See ORIGINAL ACQUISITION.)
- by gift 55
(See GIFTS.)
- by bargain and sale 185
(See SALES.)
- miscellaneous points as to incorporeal chattels 672
(See ASSIGNMENT; INDORSEMENT; LIMITATIONS.)

TREASURE-TROVE. (See ORIGINAL ACQUISITION.) 9, 10

TRUSTEE. (See AGENCY; BAILMENT.)

W.

WAIFS. (See ORIGINAL ACQUISITION.) 9

WARRANTY,

- in general; definitions, distinctions, &c.* 319, 326
- caveat emptor* the rule; exceptions numerous 328
- under executory contract 329
- how far an agent may warrant 329
- effect of custom and usage 332
- when waiver may be inferred 333
- as to express warranty* 334
- what representations have this force 334
- no special form of words necessary 337
- time of giving; prospective operation, &c. 338
- buyer's opportunity for ascertaining the defect 339
- may be in writing 340
- effect of parol evidence in such case 341
- general interpretation; cases of doubtful intent 343
- guaranty construed as warranty, and not as condition 346
- in horse-sales, &c. 346
- of animal's "soundness," "kindness," &c. 348
- as to animal's defects; when discoverable, &c. 350
- as to implied warranty of quality* 352, 353
- caveat emptor* rule, its exceptions; sources of confusion 353
- ascertained and unascertained chattels here distinguished . . . 355
- general rule as to specific ascertained chattels 355
- as to sale of meat or provisions 357
- rule as to unascertained chattels; sale by description 359
- how far description amounts to condition precedent 319, 362
- implied warranty here of merchantable quality or fitness 364
- limitations of such warranty 366, 368

WARRANTY — *continued.*

as to sales by sample	369
that bulk shall correspond with sample	371
"average sample" sales	372
rule of inspection in sample sales	372
bearing of fraud and artifice upon such sales	376
latent defects in article made, &c., to order	378
rule of warranty as to second-hand chattels	380
whether implied where express warranty is given	380
<i>as to implied warranty of title</i>	381
doubtful in executed, not executory, contracts	381
rule clear as to fraud, express warranty, &c.	382
where sale is by executor, sheriff, pledgee, bailee, &c.	382
where sale is of an incorporeal chattel	383
a quitclaim of one's title always implied	384
<i>whether in other cases there is such warranty</i>	385
English doctrine in this respect; authorities reviewed	385
buyer may recover price paid, but <i>qu.</i> as to damages	388
American doctrine in this respect	390
whether one sells while in or out of possession	390
where one, after selling, acquires a new title	392
doctrine of the civil law; eviction, &c.	392
<i>summary as to implied warranty and caveat emptor</i>	393

(See BUYER'S REMEDIES.)

WRECKS. (<i>See ORIGINAL ACQUISITION.</i>)	10
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